DOCKET

No. 13-1019

Title:	Mach Mining, LLC, Petitioner
	v.
	Equal Employment Opportunity Commission
Docketed:	February 25, 2014
Lower Ct:	United States Court of Appeals for the Seventh Circuit
Case Nos.:	(13-2456)
Decision Date:	December 20, 2013

Questions Presented

---Date---	------Proceedings and Orders----------
Feb 25 2014	Petition for a writ of certiorari filed. (Response due March 27, 2014)
Mar 14 2014	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
Mar 19 2014	Order extending time to file response to petition to and including April 28, 2014.
Mar 27 2014	Brief amici curiae of Retail Litigation Center, Inc., et al. filed.
Apr 22 2014	Order further extending time to file response to petition to and including May 27, 2014.
May 27 2014	Brief of respondent Equal Employment Opportunity Commission filed.
Jun 2 2014	Reply of petitioner Mach Mining, LLC filed.
Jun 3 2014	DISTRIBUTED for Conference of June 19, 2014.
Jun 23 2014	DISTRIBUTED for Conference of June 26, 2014.
Jun 30 2014	Petition GRANTED.
Jul 7 2014	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
Aug 1 2014	The time to file the joint appendix and petitioner's brief on the merits is extended to and including September 4, 2014.
Aug 1 2014	The time to file respondent's brief on the merits is extended to and including October 27, 2014.
Sep 4 2014	Joint appendix filed. (Statement of costs filed.)
Sep 4 2014	Brief of petitioner Mach Mining, LLC filed.
Sep 11 2014	Brief amici curiae of Equal Employment Advisory Council and Society for Human Resource Management filed.
Sep 11 2014	Brief amicus curiae of American Insurance Association filed.
Sep 11 2014	Brief amici curiae of Retail Litigation Center, Inc., et al. filed.
Oct 27 2014	Brief of respondent Equal Employment Opportunity Commission filed.
Nov 3 2014	Brief amici curiae of Impact Fund, et al. filed.

Nov 3 2014	Brief amici curiae of Women's Rights Organizations and Individuals filed.
Nov 3 2014	Brief amici curiae of States of Arizona, et al. filed.
Nov 21 2014	SET FOR ARGUMENT ON Tuesday, January 13, 2015
Nov 26 2014	Reply of petitioner Mach Mining, LLC filed.
Dec 2 2014	CIRCULATED.
Dec 2 2014	Record requested from U.S.C.A. 7th Circuit
Dec 2 2014	Record received from U.S.C.A. 7th Circuit. The record is electronic and located on PACER.
Jan 13 2015	Argued. For petitioner: Thomas C. Goldstein, Bethesda, Md. For respondents: Nicole A. Saharsky, Assistant to the Solicitor General, Department of Justice, Washington, D. C.
Apr 29 2015	Judgment VACATED and case REMANDED. Kagan, J., delivered the opinion for a unanimous Court.
Jun 1 2015	JUDGMENT ISSUED.

PETITION FOR WRIT OF CERTIORARI

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
FEB 25 2014
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13-1019

No. 13-___

IN THE

Supreme Court of the United States

MACH MINING, LLC,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In Title VII of the Civil Rights Act of 1964, "Congress established an integrated, multistep enforcement procedure culminating in the EEOC's authority to bring a civil action in federal court." *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 359 (1977). At the outset of that process, if the EEOC finds that there is reasonable cause to believe a charge of discrimination against a private party it "shall endeavor to eliminate any alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." 42 U.S.C. § 2000e-5(b). The Commission is forbidden from filing suit unless within a specified period it "has been unable to secure from the respondent a conciliation agreement acceptable to the Commission." *Id.* § 2000e-5(f)(1). Congress imposed similar requirements in the Age Discrimination in Employment Act, 29 U.S.C. § 626(b), the Fair Housing Act, 42 U.S.C. § 3610(b)(1), and federal election law, 2 U.S.C. §§ 437g(a)(4), (a)(6)(A).

The Question Presented, on which the Seventh Circuit in this case avowedly rejected the precedent of numerous other courts of appeals, is:

Whether and to what extent may a court enforce the EEOC's mandatory duty to conciliate discrimination claims before filing suit?

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of this Court's Rules, petitioner states that the parent corporation of Mach Mining, LLC is Coal Field Transports, Inc. There are no publicly held companies that own more than 10 percent of Mach Mining LLC's stock.

TABLE OF CONTENTS

QUESTION PRESENTED i

RULE 29.6 CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES v

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 3

I. Statutory Background 3

II. Procedural History 5

REASONS FOR GRANTING THE WRIT 12

I. The Circuits Are Irreconcilably Divided Over Whether, And How, The EEOC's Compliance With Its Conciliation Mandate Is Subject To Judicial Review. 12

A. The Seventh Circuit Stands Alone In Holding That The Conciliation Precondition Is Unenforceable. 13

B. Three Circuits Review The EEOC's Conciliation Efforts For "Good Faith." 16

C. Three Circuits Apply A More Demanding Three-Factor Test. 18

II. The Question Presented Is Important And Recurring. 19

III. The Decision Below Is Wrong. 22

CONCLUSION 38

APPENDIX 1a

Appendix A, Court of Appeals Decision 1a

Appendix B, District Court's January 28, 2013 Decision 31a

Appendix C, District Court's May 20, 2013 Decision 42a

TABLE OF AUTHORITIES

Cases

Adams v. Richardson,
480 F.2d 1159 (D.C. Cir. 1973) (en banc) 29

Alexander v. Gardner-Denver Co.,
415 U.S. 36 (1974) 3, 22

Baldwin Cnty. Welcome Ctr. v. Brown,
466 U.S. 147 (1984) (per curiam) 24

Barlow v. Collins,
397 U.S. 159 (1970) 35

Baumgardner v. Sec'y, U.S. Dep't Hous. & Urban Dev.,
960 F.2d 572 (6th Cir. 1992) 14, 16

Bowen v. Michigan Acad. of Family Physicians,
476 U.S. 667 (1986) 24, 35

EEOC v. Agro Distribution, LLC,
555 F.3d 462 (5th Cir. 2009) ..... passim

EEOC v. Am. Nat'l Bank,
652 F.2d 1176 (4th Cir. 1981) 13, 15, 17, 30

EEOC v. Asplundh Tree Expert Co.,
340 F.3d 1256 (11th Cir. 2003) ..... passim

EEOC v. Bimbo Bakeries USA, Inc.,
No. 1:09-CV-1872, 2010 WL 598641 (M.D. Pa. Feb. 17, 2010) 21

EEOC v. Bloomberg, L.P.,
751 F. Supp. 2d 628 (S.D.N.Y. 2010) 21

EEOC v. Bruno's Rest.,
13 F.3d 285 (9th Cir. 1993) 14

EEOC v. CRST Van Expedited, Inc.,
679 F.3d 657 (8th Cir. 2012) 14, 16, 36

EEOC v. Die Fliedermaus, LLC,
77 F. Supp. 2d 460 (S.D.N.Y. 1999) 21

EEOC v. Dillard's Inc.,
No., 08-CV-1780-IEG(PCL), 2011 WL 2784516
(S.D. Cal. July 14, 2011) 21

EEOC v. First Midwest Bank, N.A.,
14 F. Supp. 2d 1028 (N.D. Ill. 1998) 21, 31

EEOC v. Golden Lender Fin. Grp.,
No. 99 Civ. 8591(JGK), 2000 WL 381426
(S.D.N.Y. Apr. 13, 2000) 21

EEOC v. High Speed Enter., Inc.,
No. CV-08-01789-PHX-ROS, 2010 WL
8367452 (D. Ariz. Sept. 30, 2010 ..... 21, 31

EEOC v. Johnson & Higgins, Inc.,
91 F.3d 1529 (2d Cir. 1996) 13, 18

EEOC v. Keco Indus., Inc.,
748 F.2d 1097 (6th Cir. 1984) 14, 16, 17

EEOC v. Klingler Elec. Corp.,
636 F.2d 104 (5th Cir. Unit A
Feb. 1981) 14, 18, 30

EEOC v. La Rana Hawaii, LLC,
888 F. Supp.2d 1019 (D. Haw. 2012) 21

EEOC v. Original Honeybaked Ham Co. of Georgia, Inc.,
918 F Supp. 2d 1171, 1176-80 (D. Col. 2013) 21

EEOC v. Pacific Mar. Ass'n,
188 F.R.D. 379 (D. Or. 1999) 21

EEOC v. Pet, Inc., Funsten Nut Div.,
612 F.2d 1001 (5th Cir. 1980) 14, 19, 36

EEOC v. Philip Svcs. Corp.,
635 F.3d 164 (5th Cir. 2011) 27

EEOC v. Pierce Packing Co.,
669 F.2d 605 (9th Cir. 1982) 14, 16

EEOC v. Prudential Fed. Sav. & Loan Ass'n,
763 F.2d 1166 (10th Cir. 1985) 15, 16

EEOC v. Radiator Specialty Co.,
610 F.2d 178 (4th Cir. 1979) 13, 16, 17

EEOC v. Reeves,
No. CV0010515DT(RZX), 2002 WL 1151459
(C.D. Cal. 2002), *rev'd on other grounds*,
68 Fed. Appx. 830 (9th Cir. 2003) 21, 35

EEOC v. Ruby Tuesday, Inc.,
919 F. Supp. 2d 587 (W.D. Pa. 2013) 21, 31, 35

EEOC v. Sears, Roebuck & Co.,
650 F.2d 14 (2d Cir. 1981) 13, 18, 30, 36

EEOC v. Shell Oil Co.,
466 U.S. 54 (1984) 5, 25, 32

EEOC v. Sherwood Med. Indus., Inc.,
452 F. Supp. 678 (M.D. Fla. 1978) 30

EEOC v. Swissport Fueling, Inc.,
916 F. Supp. 2d 1005 (D. Ariz. 2013) 21

EEOC v. Trans States Airlines,
462 F.3d 987 (8th Cir. 2006) 14

EEOC v. UMB Bank, N.A.,
432 F. Supp. 2d 948 (W.D. Mo. 2006) 21

EEOC v. Zia Co.,
582 F.2d 527 (10th Cir. 1978) ..... passim

Fed. Express Corp. v. Holowecki,
552 U.S. 389 (2008) 32

Firefighters v. Cleveland,
478 U.S. 501 (1986) 20

Ford Motor Co. v. EEOC,
458 U.S. 219 (1982) 20

Hallstron v. Tillamook Cnty.,
493 U.S. 20 (1989) 23

Hill v. Western Elec. Co., Inc.,
672 F.2d 381 (4th Cir. 1982) 30

Jones v. Bock,
549 U.S. 199 (2007) 23

Kelly v. Sec'y, U.S. Dep't Hous. & Urban Dev.,
3 F.3d 951 (6th Cir. 1993) 14

Litton Fin. Printing Div. v. NLRB,
501 U.S. 190 (1991) 29, 32

Marshall v. Sun Oil Co.,
605 F.2d 1331 (5th Cir. 1979) 14, 16, 30

McDonnell Douglas Corp. v. Green,
411 U.S. 792 (1973) 25, 28

Morgan v. Sec'y, U.S. Dep't Hous. & Urban Dev.,
985 F.2d 1451 (10th Cir. 1993) 15

Mountain Side Mobile Estates P'ship v. Sec'y Hous. & Urban Dev.,
56 F.3d 1243 (10th Cir. 1995) 15, 16

Nat'l R.R. Passenger Corp. v. Morgan,
536 U.S. 101 (2002) 24

Occidental Life Ins. Co. v. EEOC,
432 U.S. 355 (1977) ..... i, 3, 5, 22

Patterson v. Am. Tobacco Co.,
535 F.2d 257 (4th Cir. 1976) ..... passim

Reed Elsevier, Inc. v. Muchnick,
559 U.S. 154 (2010) 23

Ricci v. DeStefano,
557 U.S. 557 (2009) 19

Serrano v. Cintas Corp.,
699 F.3d 884 (6th Cir. 2012) 14, 16, 17

Traynor v. Turnage,
485 U.S. 535 (1988) 24

United Air Lines v. Evans,
431 U.S. 553 (1977) 24

United States v. Felt & Tarrant Mfg. Co.,
283 U.S. 269 (1931) 23

United States v. Zucca,
351 U.S. 91 (1956) 23

Zipes v. Trans World Airlines, Inc.,
455 U.S. 385 (1982) 24

Statutes

Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 27

Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 28

2 U.S.C. § 437g(a)(4) ..... i, 19

2 U.S.C. § 437g(a)(6)(A) ..... i, 19

17 U.S.C. § 411(a) 23

17 U.S.C. § 501(a) 23

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1292(b) 8

29 U.S.C. § 158 29

29 U.S.C. § 158(d) 10

29 U.S.C. § 626(b) ..... i, 13, 19

42 U.S.C. § 1997e(a) 23

42 U.S.C. § 2000e-12(a) 31

42 U.S.C. § 2000e-2 3

42 U.S.C. § 2000e-5(b) ..... passim
42 U.S.C. § 2000e-5(f)(1) ..... passim
42 U.S.C. § 3610(b)(1) ..... i, 14, 19

Rules

Fed. R. Evid. 408(b) 27

Regulations

29 C.F.R. § 1601.9 31
29 C.F.R. § 1601.12 31
29 C.F.R. § 1601.14 31
29 C.F.R. § 1601.15 32
29 C.F.R. § 1601.16 32
29 C.F.R. § 1601.17 32
29 C.F.R. § 1601.18 32
29 C.F.R. § 1601.19 32
29 C.F.R. § 1601.20 32
29 C.F.R. § 1601.21 32
29 C.F.R. § 1601.24 33
29 C.F.R. § 1601.28 32

Other Authorities

EEOC, All Statutes: FY 1997 - FY 2013, http://www.eeoc.gov/eeoc/statistics/enforcement/all.cfm 21

EEOC, EEOC Litigation Statistics: FY 1997 – FY 2012, http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm 21

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EEOC, Press Release, *U.S. Equal Employment Opportunity Commission Quality Control Plan 2013 Draft Principles*, *available at* http://www.eeoc.gov/eeoc/newsroom/release/quality_controlplan_2013.cfm 33

EEOC, U.S. Equal Employment Opportunity Commission Strategic Enforcement Plan FY 2013 - 2016, *available at* http://www.eeoc.gov/eeoc/plan/sep.cfm 36

PETITION FOR A WRIT OF CERTIORARI

Petitioner Mach Mining, LLC, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (Pet. App. 1a) is published at 738 F.3d 171. The district court's decisions dated January 28, 2013 (Pet. App. 31a-41a), and May 20, 2013 (Pet. App. 42a-55a), are unpublished.

JURISDICTION

The court of appeals entered its judgment on December 20, 2013. Pet. App. 1a. The panel pre-circulated its opinion to the en banc court, which did not call for further review. *Id.* 25a n.3. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 2000e-5(b) of Title 42 provides in relevant part:

> Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer hereinafter referred to as the "respondent") within ten days, and shall

> make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. . . If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both.

Section 2000e-5(f)(1) of Title 42 provides in relevant part:

> If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government,

governmental agency, or political subdivision named in the charge.

STATEMENT OF THE CASE

Title VII of the Civil Rights Act of 1964 permits the Equal Employment Opportunity Commission (EEOC) to sue an employer only if the Commission has been unable to secure a conciliation agreement with the employer. 42 U.S.C. § 2000e-5(f)(1). This case presents the question whether that statutory litigation precondition is immune from judicial enforcement. The Seventh Circuit held that it is, acknowledging it was exacerbating an already-significant circuit conflict over whether and how Title VII's conciliation obligation may be enforced in court.

I. Statutory Background

Title VII prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2. While Congress has authorized suits by individuals and the Equal Employment Opportunity Commission (EEOC) to enforce the statute, "[c]ooperation and voluntary compliance were selected as the preferred means for achieving th[e] goal" of equal employment opportunity. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). Toward that end, "Congress established an integrated, multistep enforcement procedure culminating in the EEOC's authority to bring a civil action in a federal court." *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 359 (1977).

First, a charge of discrimination must be "filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission" alleging an

"unlawful employment practice." 42 U.S.C. § 2000e-5(b).

Second, upon receipt of the charge, the Commission "shall serve a notice of the charge . . . on such employer" and "shall make an investigation thereof." *Id.*

Third, "[i]f the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission *shall* endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." *Id.* (emphasis added).[1] "Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned." *Id.*

Fourth, the Commission may not file suit unless within a specified period "the Commission has been unable to secure from the respondent a conciliation

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[1] By contrast, "[i]f the Commission determines after such investigation that there is *not* reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action." 42 U.S.C. § 2000e-5(b) (emphasis added). An individual complainant may then file her own civil action. *Id.* § 2000e-5(f)(1).

agreement acceptable to the Commission." *Id.* § 2000e-5(f)(1).[2]

The EEOC's power to sue an employer – added to the statute in 1972 – was a departure from the statute as originally enacted, which limited the Commission to informal conciliation efforts. *See Occidental Life*, 432 U.S. at 367-68. But in authorizing the EEOC to bring suit, Congress "did not abandon its wish that violations of the statute could be remedied without resort to the courts, as is evidenced by its retention in 1972 of the requirement that the Commission, before filing suit, attempt to resolve disputes through conciliation." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 78 (1984). The EEOC is thus "required by law to refrain from commencing a civil action until it has discharged its administrative duties," including its "responsibility" for "settling disputes, if possible, in an informal, noncoercive fashion." *Occidental Life*, 432 U.S. at 368.

II. Procedural History

1. In early 2008, the EEOC received a single charge of discrimination against petitioner, a coal mining company, alleging the complainant had been denied employment as a coal miner because of her sex. Pet. App. 3a. The Commission issued a determination that there was reasonable cause to believe petitioner had "discriminated against [the] Charging Party and a class of female applicants,

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[2] If the respondent is a governmental entity, the Commission is required to refer the case to the Attorney General for litigation. 42 U.S.C. § 2000e-5(f)(1).

because of their sex, in that [petitioner] failed to recruit and hire them, in violation of Title VII." Mot. for Sum. Judg., R. 32-1, Ex. B.[3] But other than stating that the finding was based on "the evidence obtained during the course of the investigation," the determination contained no information regarding the basis of the finding. *Id.* Nor did it identify the individuals other than the charging party against whom petitioner allegedly discriminated, or otherwise define the size or scope of the class of alleged victims. *Id.*

The Commission then presented petitioner with a verbal conciliation demand, but later notified petitioner that it had determined that the conciliation process had failed and that further discussions would be futile. Mot. for Sum. Judg., R. 32-1, Ex. C.[4]

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[3] "R. XX-Y" refers to the docket entry for the relevant document in the district court record.

[4] In the district court, the Commission's position was that evidence regarding the substance of the conciliation process was *per se* irrelevant as a matter of law because the conciliation precondition was not judicially enforceable. Moreover, although the EEOC has itself regularly introduced conciliation evidence to prove compliance with the conciliation precondition, *see* Pet. App. 8a n.1, it opposed any attempt by petitioner to introduce that evidence, arguing that Title VII precluded disclosure of what was said or done during conciliation even for the limited purposes of reviewing the EEOC's compliance with the conciliation precondition to litigation. *See* Pet. App. 48a (citing 42 U.S.C. § 2000e-5(b)). Commission lawyers thus threatened to move for sanctions against petitioner's counsel *personally* if they made any such submission. *See* Def. Opp. to Mot. for Sum. Judg., R. 42-1, Ex. A. Accordingly, although petitioner's brief in

2. A few days later, the Commission sued petitioner in the United States District Court for the Southern District of Illinois. *See* Compl., R.2. The complaint alleges that petitioner had either engaged in "a policy or practice of not hiring women for mining and related positions" or "in the alternative, had a neutral hiring policy which had a disparate impact on women applicants for mining and related positions." *Id.* 1. The Commission sought backpay, compensatory damages, and punitive damages for an undefined "class of female applicants," in "amounts to be determined at trial." *Id.* 4. The same day, the Commission issued a press release, featuring inflammatory quotes from EEOC attorneys, including the assertion that "Mach Mining needs to realize that this is 2011, not 1911."[5] The Commission's attorneys further stated that they hoped that the litigation would send a signal to other employers to reconsider policies having a disparate impact.[6]

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opposition to the Commission's motion for summary judgment included a proffer of what the evidence would show, no evidence regarding any conciliation process was included in the summary judgment record. *See* Def. Opp. to Mot. for Sum. Judg., R. 42-1 at 17-20; Pet. App. 40a. Instead, the lower courts decided the case on the purely legal question of whether the conciliation requirement is judicially enforceable.

[5] *See* EEOC, Press Release, *ACH Mining Sued by EEOC for Sex Discrimination: Federal Agency Asserts That Coal Mine's Failure to Hire Qualified Female Applicants Violated Civil Rights Law* (Sept. 27, 2011), *available at* http://www.eeoc.gov/eeoc/newsroom/release/9-27-11c.cfm.

[6] *Id.*

Petitioner filed an answer raising, among other things, the affirmative defense that the Commission had failed to fulfill its statutory obligation to conciliate in good faith the allegations raised in the complaint before filing suit. Answer, R.10 at 3.

The Commission subsequently moved for partial summary judgment on petitioner's conciliation defense, arguing that "its conciliation process is not subject to judicial review." Pet. App. 32a. The Commission notably did not assert that if the conciliation obligation was enforceable, it was satisfied in this case.

The district court denied the motion. Pet. App. 31a. The court observed that while "there is a circuit split as to the scope of an inquiry a court may make into the EEOC's statutory conciliation obligations," *id.* 34a, all of the courts "that have weighed in on the matter agree that conciliation is subject to at least *some* level of review," *id.* 35a. The court declined to go further to decide whether the EEOC's conciliation efforts were sufficient in this case, explaining that the Commission "fails to argue that its conciliation efforts would satisfy either the 'deferential standard' or the 'heightened scrutiny' standard" applied in the various circuits. *Id.* 37a.

At the Commission's request, however, the court certified two questions for interlocutory appellate review under 28 U.S.C. § 1292(b):

> (1) Is the EEOC's conciliation process subject to judicial review?; and
>
> (2) If so, is that level of review a deferential or heightened scrutiny level of review?

Pet. App. 52a.

3. The Seventh Circuit reversed. The court recognized that *every* circuit to have addressed the question has held that the EEOC's compliance with the conciliation precondition to litigation is judicially enforceable, although those courts "stand divided over the level of scrutiny to apply in reviewing conciliation." Pet. App. 24a. The court explained that "the Second, Fifth, and Eleventh Circuits evaluate conciliation under a searching three-part inquiry" while the "Fourth, Sixth, and Tenth Circuits require instead that the EEOC's efforts meet a minimal level of good faith." *Id.* 25a.

The Seventh Circuit, however, "disagree[d] with our colleagues in other circuits," Pet. App. 3a, avowedly making itself "the first circuit to reject explicitly the implied affirmative defense of failure to conciliate." *Id.* 24a.[7] Specifically, the Seventh Circuit held that courts are forbidden from even asking whether the Commission has fulfilled its conciliation obligation: "If the EEOC has pled on the face of its complaint that it has complied with all procedures required under Title VII and the relevant documents are facially sufficient, our review of those procedures is satisfied." *Id.* 30a (citation omitted).

In striking out on its own, the Seventh Circuit found it significant that the text of Title VII contains no "express provision for an affirmative defense based on an alleged defect in the EEOC's conciliation

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[7] The court thus "proceeded as if we are creating a circuit split" by circulating the opinion among the other active judges in the circuit, none of whom favored addressing the question en banc. Pet. App. 25a & n.3.

efforts," Pet. App. 5a-6a, and makes conciliation discussions confidential, *id.* 7a. In the court's view, the confidentiality provision would require courts "to evaluate conciliation without evidence to weigh, at least without the consent of both parties." *Id.* 9a. The court acknowledged the possibility that conciliation evidence could be filed under seal and that the provision might be read to prohibit only use of conciliation evidence in proceedings on the *merits* of a discrimination claim. *Id.* 8a-9a & n.1. But it concluded that the better reading of the statute was that judicial inquiry is forbidden. *Id.* 9a.

To buttress that interpretation, the court relied on a variety of policy considerations. The court believed, for example, that although other courts had been enforcing the conciliation obligation for decades, there was no "meaningful standard to apply." Pet. App. 9a. The court acknowledged that many courts apply a "good faith" standard similar to the requirement in the National Labor Relations Act that unions and employers bargain in good faith, which obligation is judicially enforceable. *Id.* 11a; 29 U.S.C. § 158(d). And it recognized that other circuits – in decisions dating to 1978 – uniformly have been able to draw a distinction "between review of the conciliation process, which they permit, and review of the substance of the EEOC's position, which is supposedly prohibited." Pet. App. 12a. However, the Seventh Circuit believed that this distinction "is unlikely to survive the adversarial crucible of litigation," although the court did not point to any examples from the decades-long experience of other circuits. *Id.*

The court also speculated that "[o]ffering the implied defense invites employers to use the conciliation process to undermine enforcement of Title VII rather than to take the conciliation process seriously as an opportunity to resolve a dispute." Pet. App. 16a. But, again, the court pointed to nothing in the experience of other circuits to support that claim.

At the same time, the court was "not persuaded" by petitioner's argument that EEOC field offices sometimes have incentives to short-circuit the conciliation process in favor of litigation to advance the Commission's policy agenda. Pet. App. 19a. Although other courts in numerous decisions had identified woefully inadequate conciliation efforts by the Commission, the Seventh Circuit perceived that the "agency has its own powerful incentives to conciliate," given that it litigates only a portion of the claims it fails to settle through conciliation. *Id.* 20a. Judicial review of the process was further unnecessary, the court thought, because "Congress can exert its influence on the EEOC through oversight hearings, adjustments to appropriations, and statutory amendments," and because the Commissioners are "appointed by the President with the advice and consent of the Senate." *Id.* 20a-21a.

REASONS FOR GRANTING THE WRIT

This case presents the Court with an opportunity to resolve an intractable circuit conflict over the meaning of a central provision of the nation's most important and frequently litigated employment discrimination statute. Because Congress has long deemed voluntary conciliation more effective at obtaining equal employment opportunities for all, it expressly conditioned the EEOC's litigation authority on the agency first exhausting conciliation efforts. In this case, the Seventh Circuit acknowledged that it was further exacerbating a long-standing circuit conflict over the extent to which that requirement is judicially enforceable, taking the most extreme position yet by holding that the conciliation precondition is not judicially enforceable at all. The resulting circuit conflict and the court of appeals' reading of the statute are untenable and require this Court's review.

I. The Circuits Are Irreconcilably Divided Over Whether, And How, The EEOC's Compliance With Its Conciliation Mandate Is Subject To Judicial Review.

The decision in this case exacerbates a circuit conflict over whether, and how, courts may review the EEOC's compliance with Title VII's conciliation precondition to suit. The circuits are now spread along a continuum: (1) the Seventh Circuit stands alone in holding that the conciliation precondition is judicially unenforceable; (2) three circuits hold that the precondition is subject to judicial review, but under a quite deferential standard (along with two other circuits that enforce the precondition but have

not articulated a specific standard of review); and (3) three circuits apply a more searching review using a three-factor test that focuses on the Commission's provision of basic information to the employer and the EEOC's willingness to engage in a reasonable back and forth with the defendant.

A. The Seventh Circuit Stands Alone In Holding That The Conciliation Precondition Is Unenforceable.

The Seventh Circuit explained that its decision in this case "makes us the first circuit to reject explicitly the implied affirmative defense of failure to conciliate." Pet. App. 24a. In fact, the decision created an eight-to-one circuit conflict on the basic question whether the conciliation precondition is judicially enforceable at all.

1. In a line of decisions stretching back more than thirty-five years, eight circuits have held that the EEOC's compliance with the conciliation precondition is subject to judicial review in any subsequent enforcement action the Commission might bring.

Second Circuit: *EEOC v. Sears, Roebuck & Co.*, 650 F.2d 14, 18-19 (2d Cir. 1981); *see also EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529, 1534-35 (2d Cir. 1996) (reviewing Commission compliance with conciliation requirement of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 626(b)).

Fourth Circuit: *EEOC v. Am. Nat'l Bank*, 652 F.2d 1176, 1185-86 (4th Cir. 1981); *EEOC v. Radiator Specialty Co.*, 610 F.2d 178, 183 (4th Cir. 1979); *Patterson v. Am. Tobacco Co.*, 535 F.2d 257, 272 (4th Cir. 1976).

Fifth Circuit: *EEOC v. Agro Distribution, LLC*, 555 F.3d 462, 467-69 (5th Cir. 2009); *EEOC v. Klingler Elec. Corp.*, 636 F.2d 104, 106-07 (5th Cir. Unit A Feb. 1981); *EEOC v. Pet, Inc., Funsten Nut Div.*, 612 F.2d 1001, 1002-03 (5th Cir. 1980); *see also Marshall v. Sun Oil Co.*, 605 F.2d 1331, 1334-39 (5th Cir. 1979) (same under ADEA).

Sixth Circuit: *Serrano v. Cintas Corp.*, 699 F.3d 884, 904-05 (6th Cir. 2012); *EEOC v. Keco Indus., Inc.*, 748 F.2d 1097, 1101-02 (6th Cir. 1984); *see also Kelly v. Sec'y, U.S. Dep't Hous. & Urban Dev.*, 3 F.3d 951, 954-57 (6th Cir. 1993) (same under the Fair Housing Act (FHA), 42 U.S.C. § 3610(b)(1)); *Baumgardner v. Sec'y, U.S. Dep't Hous. & Urban Dev.*, 960 F.2d 572, 578-79 (6th Cir. 1992) (same).

Eighth Circuit: *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657, 676-77 (8th Cir. 2012); *see also EEOC v. Trans States Airlines*, 462 F.3d 987, 996 (8th Cir. 2006) (permitting judicial review into "EEOC's failure to satisfy its obligation to conciliate" to decide whether to award attorney's fees against Commission).

Ninth Circuit: *EEOC v. Bruno's Rest.*, 13 F.3d 285, 288-89 (9th Cir. 1993) (reviewing adequacy of conciliation efforts in context of request for attorney's fee award against the agency); *cf. also EEOC v. Pierce Packing Co.*, 669 F.2d 605, 609 (9th Cir. 1982) (holding that settlement reached prior to EEOC investigation into charges not enforceable in federal court, in part because "[g]enuine investigation, reasonable cause determination and conciliation are jurisdictional conditions precedent to suit by the EEOC which are conspicuously absent here").

Tenth Circuit: *EEOC v. Zia Co.*, 582 F.2d 527, 532-34 (10th Cir. 1978); *cf. also Mountain Side Mobile Estates P'ship v. Sec'y Hous. & Urban Dev.*, 56 F.3d 1243, 1249-50 (10th Cir. 1995) (same under Fair Housing Act); *Morgan v. Sec'y, U.S. Dep't Hous. & Urban Dev.*, 985 F.2d 1451, 1456-57 (10th Cir. 1993) (same); *EEOC v. Prudential Fed. Sav. & Loan Ass'n*, 763 F.2d 1166, 1169 (10th Cir. 1985) (same under ADEA).

Eleventh Circuit: *EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1259-61 (11th Cir. 2003).

2. The Seventh Circuit was aware of this consensus, *see* Pet. App. 25a, but chose to "disagree with our colleagues in other circuits and hold that the statutory directive to the EEOC to negotiate first and sue later does not implicitly create a defense." *Id.* 3a.

There is no prospect that this division will heal itself without this Court's intervention. Certainly, the Seventh Circuit is not about to change its mind. Invoking circuit practice for decisions "creating a circuit split," the panel circulated its opinion to the rest of the active members of the court prior to publication, but "[n]o judge favored a rehearing en banc on the question of rejecting the implied affirmative defense for failure to conciliate." Pet. App. 25a n.3.

Likewise, the Seventh Circuit did not question that the law in other circuits was firmly settled in favor of judicial review. In numerous opinions, those courts have carefully explained the basis of their conclusion that the conciliation precondition is enforceable and gone on to decide how that obligation is to be enforced. *See, e.g.*, *Am. Nat'l Bank*, 652 F.2d

at 1185-86; *Zia Co.*, 582 F.2d at 532-34; *Agro Distribution*, 555 F.3d at 467-69; *see also Baumgardner*, 960 F.2d at 578-79 (considering same issue under FHA); *Marshall*, 605 F.2d at 1334-37 (same under ADEA). There is no reasonable likelihood that eight other circuits will take up the issue en banc and reverse course.

B. Three Circuits Review The EEOC's Conciliation Efforts For "Good Faith."

As the Seventh Circuit explained, the circuits that enforce the conciliation precondition "stand divided over the level of scrutiny to apply in reviewing conciliation." Pet. App. 24a. Of the eight circuits that enforce the precondition, six have articulated specific standards of review, falling into two camps.[8]

The Fourth, Sixth, and Tenth Circuits enforce the conciliation precondition by asking generally whether the Commission acted in "good faith" or "reasonably." *See, e.g.*, *Radiator Specialty Co.*, 610 F.2d at 183 (4th Cir.); *Serrano*, 699 F.3d at 904 (6th Cir.); *Keco*, 748 F.2d at 1102 (6th Cir.); *Zia Co.*, 582 F.2d at 533 (10th Cir.); *see also Mountain Side*, 56 F.3d at 1249 (same under FHA); *Prudential Fed. Sav.*

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[8] The Eighth and Ninth Circuits have not clearly articulated a standard of review. The Eighth Circuit has suggested that the EEOC must provide an employer with a "meaningful opportunity to conciliate," without further elaboration. *CRST Van Expedited*, 679 F.2d at 676. The Ninth Circuit similarly has held only that "*[g]enuine* conciliation" is a "jurisdictional condition[] precedent to suit by the EEOC." *Pierce Packing Co.*, 669 F.2d at 608 (emphasis added).

& Loan Ass'n, 763 F.2d at 1168-69 (same under ADEA).

In these circuits, courts require that the Commission make a genuine effort to conciliate claims before proceeding to court. They have held, for example, that the Commission cannot seek to conciliate claims regarding "race discrimination in hiring" but then bring a "subsequent suit including charges of race discrimination in layoffs , or sex discrimination." *Am. Nat'l Bank*, 652 F.2d at 1186; *see also Patterson*, 535 F.2d at 271-72 (dismissing sex discrimination claims against union when Commission attempted conciliation of those claims only with employer). And they have required that the Commission provide employers a reasonable time to respond to conciliation offers. *See, e.g., Zia Co.*, 582 F.2d at 534 (five days to respond found unreasonable under circumstances of the case).

At the same time, these circuits have emphasized the modest demands of their good faith standard. *See Radiator Specialty Co.*, 610 F.2d at 183 ("The law requires, however, no more than a good faith attempt at conciliation."); *Keco*, 748 F.2d at 1102 ("The district court should only determine whether the EEOC made an attempt at conciliation."). The Sixth Circuit, for example, has held that the "EEOC is under no duty to attempt further conciliation after an employer rejects its offer." *Serrano*, 699 F.3d at 905 (quoting *Keco*, 748 F.2d at 1101)) (internal quotation marks omitted).

C. Three Circuits Apply A More Demanding Three-Factor Test.

While agreeing that the Commission must act in good faith,[9] the Second, Fifth, and Eleventh Circuits have gone further, holding that to act in good faith, the Commission must:

1) outline to the employer the reasonable cause for its belief that Title VII has been violated;
2) offer an opportunity for voluntary compliance; and
3) respond in a reasonable and flexible manner to the reasonable attitudes of the employer.

Agro Distribution, 555 F.3d at 468 (5th Cir.); *see also Asplundh Tree Expert*, 340 F.3d at 1259 (11th Cir.) (same); *Klingler Elec.*, 636 F.2d at 107 (5th Cir.) (same); *Johnson & Higgins, Inc.*, 91 F.3d at 1534-35 (2d. Cir.) (same under ADEA, relying on Title VII cases).

Under this standard, courts have required the Commission to provide employers with basic information about the agency's claims and demands, including "the basis for the EEOC's charges against it." *Asplundh Tree Expert Co.*, 340 F.3d at 1260. In addition, in these circuits it is not enough – as the Sixth Circuit has held under its unadorned "good faith" test, *see supra* at 17 – for the EEOC to simply

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[9] *See, e.g., Agro Distr.*, 555 F.3d at 467; *Asplundh Tree Expert Co.*, 340 F.3d at 1260; *Sears, Roebuck & Co.*, 650 F.2d at 17.

present a conciliation demand, and then sue if the offer is rejected. Instead, the Commission must engage in a reasonable give and take with the employer. *See, e.g.*, *Agro Distribution*, 555 F.3d at 468 & n.6 (contrasting Fifth Circuit's rule with Sixth Circuit's standard and holding that EEOC violates duty to conciliate when it makes a "take-it-or-leave-it offer"); *Asplundh Tree Expert Co.*, 340 F.3d at 1260 (conciliation requirement not satisfied by "all-or-nothing" approach). Thus, for example, the Fifth Circuit has held that the Commission failed its conciliation obligation by refusing an employer's offer to conciliate class issues unless the employer first agreed to provide a remedy to the charging individual. *Pet, Inc.*, 612 F.2d at 1002.

II. The Question Presented Is Important And Recurring.

Certiorari to resolve this multifaceted conflict is further warranted because the proper administration of Title VII's conciliation precondition goes to the heart of the statute's intended enforcement mechanism and affects thousands of discrimination cases every year. Further, the Question Presented also governs the enforceability of conciliation under the Age Discrimination in Employment Act, 29 U.S.C. § 626(b), the Fair Housing Act, 42 U.S.C. § 3610(b)(1); and federal election law, 2 U.S.C. §§ 437g(a)(4), (a)(6)(A).

This Court has repeatedly acknowledged "Congress' intent that voluntary compliance be the preferred means of achieving the objectives of Title VII." *Ricci v. DeStefano*, 557 U.S. 557, 581 (2009) (quoting *Firefighters v. Cleveland*, 478 U.S. 501, 515

(1986)) (internal quotation marks omitted); *see also Ford Motor Co. v. EEOC*, 458 U.S. 219, 228 (1982) ("[T]he legal rules fashioned to implement Title VII should be designed, consistent with other Title VII policies, to encourage Title VII defendants promptly to make curative, unconditional job offers to Title VII claimants, thereby bringing defendants into 'voluntary compliance' and ending discrimination far more quickly than could litigation proceeding at its often ponderous pace."). The requirement that the EEOC attempt to conciliate claims before resorting to litigation is the principal means by which that policy is implemented. And the process cannot function as intended unless the Commission performs its statutory duty reasonably and in good faith.

The vast majority of circuits have concluded that in light of these considerations the EEOC cannot evade judicial enforcement of the express conciliation obligation, while the Seventh Circuit drew the opposite conclusion, believing that judicial "review undermines conciliation." Pet. App. 16a (capitalization altered). Either way, however, everyone agrees that the answer to the question presented by this petition is of critical importance to the intended functioning of one of the most important aspects of the statute.

The proper functioning of the statute, in turn, is critical to the appropriate resolution of thousands of discrimination claims processed by the EEOC every year. As the court of appeals explained, the Commission "currently processes and investigates nearly 100,000 charges of discrimination a year." Pet. App. 20a. Historically, the Commission has found reasonable cause (thereby triggering its

conciliation duty) in approximately 3,500 – 9,000 cases per year.[10] The Commission has filed suit in approximately 125 – 425 cases per year.[11] And as the numerous decisions cited above demonstrate, a recurring question in those cases is how (and whether) a court should enforce the conciliation mandate.[12]

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[10] *See* EEOC, All Statutes: FY 1997 FY 2013, http://www.eeoc.gov/eeoc/statistics/enforcement/all.cfm.

[11] *See* EEOC, EEOC Litigation Statistics: FY 1997 – FY 2012, http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm.

[12] In many circuits, the question has been so well settled for so long that there are few recent appeals raising the question presented by this petition. But litigation in the trial courts over whether the EEOC has satisfied the conciliation precondition remains common. *See, e.g.*, *EEOC v. Swissport Fueling, Inc.*, 916 F. Supp. 2d 1005, 1036 (D. Ariz. 2013) (ADEA case); *EEOC v. Ruby Tuesday, Inc.*, 919 F. Supp. 2d 587, 595-98 (W.D. Pa. 2013); *EEOC v. Original Honeybaked Ham Co. of Georgia, Inc.*, 918 F. Supp. 2d 1171 (D. Col. 2013); *EEOC v. La Rana Hawaii, LLC*, 888 F. Supp. 2d 1019, 1045 (D. Haw. 2012); *EEOC v. Dillard's Inc.*, No., 08-CV-1780-IEG(PCL), 2011 WL 2784516, at *5 (S.D. Cal. July 14, 2011); *EEOC v. Bloomberg, L.P.*, 751 F. Supp. 2d 628, 642 (S.D.N.Y. 2010); *EEOC v. High Speed Enter., Inc.*, No. CV-08-01789-PHX-ROS, 2010 WL 8367452, at *3 (D. Ariz. Sept. 30, 2010); *EEOC v. Bimbo Bakeries USA, Inc.*, No. 1:09-CV-1872, 2010 WL 598641, at *7 (M.D. Pa. Feb. 17, 2010); *EEOC v. UMB Bank, N.A.*, 432 F. Supp. 2d 948, 954-55 (W.D. Mo. 2006); *EEOC v. Reeves*, No. CV0010515DT(RZX), 2002 WL 1151459, at *6 (C.D. Cal. 2002), *rev'd on other grounds*, 68 Fed. Appx. 830 (9th Cir. 2003); *EEOC v. Golden Lender Fin. Grp.*, No. 99 Civ. 8591(JGK), 2000 WL 381426, at *5 (S.D.N.Y. Apr. 13, 2000); *EEOC v. Pacific Mar. Ass'n*, 188 F.R.D. 379, 380-81 (D. Or. 1999); *EEOC v. Die Fliedermaus, LLC*, 77 F. Supp. 2d

III. The Decision Below Is Wrong.

Certiorari is also warranted because the Seventh Circuit's ruling is wrong.

1. The court of appeals did not contest that Title VII's plain text makes conciliation efforts by the Commission *mandatory* and an express precondition to suit. Pet. App. 6a. It could hardly conclude otherwise. The statute provides that upon finding of reasonable cause "the Commission *shall* endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." 42 U.S.C. § 2000e-5(b) (emphasis added). And it permits suits by the Commission only *"[i]f* the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission" within a specified period of time. *Id.* § 2000e-5(f)(1) (emphasis added).

Making conciliation a precondition to litigation was hardly inadvertent. As originally enacted, the Commission's only enforcement authority was the ability to engage in conciliation. *See Alexander v. Gardner-Davis Co.*, 415 U.S. 36, 44 (1974). As this Court has noted, although Congress subsequently expanded that authority to include enforcement litigation, Congress remained committed to having voluntary compliance be the principal form of Title VII enforcement. *See, e.g.*, *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, at 367-68 (1977). Congress

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460, 467 (S.D.N.Y. 1999); *EEOC v. First Midwest Bank, N.A.*, 14 F. Supp. 2d 1028, 1031-33 (N.D. Ill. 1998).

could reasonably fear that unless it made conciliation a precondition to litigation, the Commission's lawyers would litigate first and negotiate later.

The Seventh Circuit noted that the statute does not expressly state that non-compliance with the conciliation precondition is an affirmative defense to a premature EEOC lawsuit. Pet. App. 5a-6a. But that observation asks the wrong question – this Court has long treated compliance with statutory preconditions to suit as subject to judicial review and non-compliance as a defense. The "general rule," this Court has explained, is that "if an action is barred by the terms of a statute, it must be dismissed." *Hallstron v. Tillamook Cnty.*, 493 U.S. 20, 31 (1989) (holding that non-compliance with pre-suit notice requirement in the Resource Conservation and Recovery Act requires dismissal); *see also, e.g., Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 157-58 (2010) (under 17 U.S.C. §§ 501(a), 411(a), copyright registration is a precondition "plaintiffs ordinarily must satisfy before filing an infringement claim"); *Jones v. Bock*, 549 U.S. 199, 211-12 (2007) (failure to comply with administrative exhaustion requirement of the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), is a basis for dismissal); *United States v. Zucca*, 351 U.S. 91, 94 (1956) (upholding dismissal of denaturalization suit when government failed to comply with precondition); *United States v. Felt & Tarrant Mfg. Co.*, 283 U.S. 269, 272 (1931) ("The filing of a claim or demand as a prerequisite to a suit to recover taxes paid is a familiar provision of the revenue laws, compliance with which may be insisted upon by the defendant ").

Application of that general rule is particularly appropriate with respect to preconditions on an administrative agency's right to sue, given the "strong presumption that Congress intends judicial review of administrative action." *Traynor v. Turnage*, 485 U.S. 535, 542 (1988) (citations and internal punctuation omitted); *see also, e.g.*, *Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667, 672 n.3 (1986) (explaining that "judicial review is the rule" and "the intention to exclude it must be made specifically manifest") (citation and internal quotation marks omitted).

This Court has applied that same general rule to Title VII's preconditions to suit. For example, this Court has repeatedly interpreted the statute to require dismissal of private suits based on untimely charges. *See, e.g.*, *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114-15 (2002) (ordering claims based on untimely charge to be dismissed); *United Air Lines v. Evans*, 431 U.S. 553, 557 (1977) (same); *id.* at 555 n.4 ("Timely filing [of a charge] is a prerequisite to maintenance of a Title VII action."); *see also Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) (explaining that while timely filing of a charge "is not a *jurisdictional* prerequisite to suit" – and therefore is subject to the equitable doctrine of tolling – an untimely charge is still a basis for dismissal) (emphasis added). Likewise, Title VII provides that a complainant may file a civil action "within ninety days after" receiving a right-to-sue letter, but does not make non-compliance with that deadline an express defense. 42 U.S.C. § 2000e-5(f)(1). But this Court has long understood that such a defense exists. *See Baldwin Cnty. Welcome Ctr. v.*

Brown, 466 U.S. 147 (1984) (per curiam); *see also McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798 (1973) (calling timely filing of charge and receipt of right-to-sue letter "jurisdictional prerequisites to a federal action").

Nor has the Court limited such defenses to cases brought by private plaintiffs. In *EEOC v. Shell Oil Co.*, 466 U.S. 54 (1984), the Commission brought suit to enforce an administrative subpoena. The subject of the investigation, Shell Oil, defended on the ground that Title VII permits the Commission to issue subpoenas only as part of an investigation triggered by a proper charge of discrimination. Shell Oil further argued that the charge against it failed to include the information required by the statute and the EEOC's regulations. *Id.* at 59. Although the statute does not expressly state that non-compliance with the charge requirements is a defense to an EEOC suit to enforce a subpoena, this Court recognized the defense. The Court held that "the existence of a charge that meets the requirements set forth in . 42 U.S.C. § 2000e-5(b) is a jurisdictional prerequisite to judicial enforcement of a subpoena issued by the EEOC." 466 U.S. at 65. The Court explained that this conclusion flowed from Title VII's "integrated, multistep enforcement procedure," *id.* at 62 (citation omitted), under which filing of a valid charge was made a precondition to the EEOC's authority to issue a subpoena, *id.* at 64-65. And the Court had no difficulty in concluding that the Commission's compliance with that statutory precondition was subject to judicial review. *See id.* at 67-81.

2. Accordingly, the question in this case is whether there is some convincing basis to believe that Congress intended Title VII's conciliation precondition to be treated anomalously, requiring courts to accept the Commission's word for it that the prerequisite has been satisfied.[13] There is not.

The court of appeals noted that the statute requires only that the EEOC "endeavor" to reach an agreement through "informal" means, and that the Commission may sue if it is unable to obtain a "conciliation agreement acceptable to the Commission." Pet. App. 7a (quoting 42 U.S.C. §§ 2000e-5(b), 2000e-5(f)(1) (emphasis omitted)). But that simply shows, as all the circuits recognize, that the statute leaves it up to the Commission to decide whether the *substance* of a settlement proposal is satisfactory; it does not show that Congress intended to preclude judicial review of the *procedural* adequacy of the Commission's conciliation efforts. For example, a court need not inquire into the substantive adequacy of the parties' proposals to determine that the EEOC may not conciliate claims of race discrimination with respect to an individual, then file suit claiming sex discrimination against a class. *See, e.g.*, *Patterson v. Am. Tobacco Co.*, 535 F.2d 257, 271-72 (4th Cir. 1976).

The Seventh Circuit also placed great weight on the fact that the statute provides that "[n]othing said or done during and as a part of such informal

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[13] The Seventh Circuit's reference to the Court's reluctance to imply private rights of action, Pet. App. 19a-20a, is thus entirely inapt.

endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned." Pet. App. 7a-8a (quoting 42 U.S.C. § 2000e-5(b)). It makes little sense to believe that Congress prohibited judicial review not directly, but instead through the indirection of prohibiting the disclosure of certain evidence. Further, as the district court rightly concluded, this provision does not erect an insurmountable bar to judicial review. *Id.* 48a-51a. A court can prevent conciliation evidence from being "made public" by keeping it under seal. And, as the EEOC itself has argued in the past, the proscription against using conciliation evidence "in a subsequent proceeding" is most sensibly read to preclude using that evidence as proof of discrimination in proceedings on the merits, consistent with the practice under Federal Rule of Evidence 408(b). *See EEOC v. Philip Svcs. Corp.*, 635 F.3d 164, 165 (5th Cir. 2011) ("The Commission argues that this court should read the statute as prohibiting disclosure only in subsequent proceedings on the merits of the charge "); Pet. App. 50a-51a.

The history of the statute confirms this interpretation. The confidentiality requirement was enacted as part of the original statute, when the Act permitted suit only by aggrieved parties, not the Commission. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(a), 78 Stat. 241, 259. At that time, the only conceivable use for conciliation evidence in a subsequent judicial proceeding would have been to prove (or disprove) the merits of the discrimination

claim.[14] It was only later that Congress gave the EEOC authorization to sue, subject to the conciliation precondition. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 4(a), 86 Stat. 103, 105. While that amendment left in place the original confidentiality language, that is no reason to believe that Congress intended that pre-existing provision to render unreviewable (and therefore largely precatory) the condition it had just attached to the Commission's litigation authority.

3. The Seventh Circuit also concluded that Congress could not have intended the conciliation obligation to be judicially reviewed because there is no "meaningful standard to apply." Pet. App. 9a. The court further doubted that judicial review could be cabined to examination of the conciliation *process* as distinct from the *substance* of the Commission's settlement offers and decisions. *Id.* 12a. But those conclusions are belied by more than three decades of experience in the circuits providing such review. Moreover, to the extent greater guidance might be desirable, the EEOC itself is empowered to provide it through regulations. The Commission cannot evade judicial oversight through the maneuver of refusing to interpret a statutory provision within its authority.

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[14] Sensibly, the Commission's compliance with its conciliation obligation has never been considered a precondition for a *private* suit. *See McDonnell Douglas*, 411 U.S. at 798-99. Accordingly, prior to the authorization of suits by the Commission itself, defendants would not have had any reason to present conciliation evidence to prove the inadequacy of the conciliation process.

a. The Seventh Circuit acknowledged that other courts have generally reviewed the Commission's conciliation efforts under a "good faith" standard that specifically rejects any authority to decide the reasonableness of the EEOC's settlement offers or its decision to reject an employer's counter-proposal. Pet. App. 11a. And the court of appeals recognized that in the National Labor Relations Act (NLRA), Congress imposed a similar obligation on employers and unions to bargain in good faith, a requirement that has been subject to administrative and judicial review for decades. *Id.* (citing 29 U.S.C. § 158); *see, e.g.*, *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198-99 (1991) (duty to bargain in good faith judicially enforceable); *cf. also Adams v. Richardson*, 480 F.2d 1159, 1163 (D.C. Cir. 1973) (en banc) (rejecting agency claim that enforcement provisions of Title VI, which also require that agency attempt to secure voluntary compliance before taking further enforcement steps, are not subject to judicial review).

Aside from noting that the NLRA expressly requires good faith bargaining (which is beside the point at issue here – *viz.*, whether such a requirement can be judicially administered) the Seventh Circuit worried that it may be impossible to administer a good faith standard without second-guessing the Commission's decisions about what kinds of relief are appropriate in a particular case. Pet. App. 12a. But that worry simply ignores the established record in other circuits, where courts have enforced reasonable standards of conduct without invading that administrative prerogative. For example, courts have held that good faith

requires the following modest steps by the Commission:

- Engaging in conciliation on the actual claims later brought in litigation.[15]
  - The Commission may not, for example, conciliate race discrimination claims, but litigate sex discrimination claims.[16]
  - Nor may the EEOC conciliate only individual claims, then attempt to litigate class claims.[17]
  - Conversely, the Commission cannot limit conciliation to discussion of class-wide claims, then litigate only individual claims that were never discussed.[18]
- Providing the defendant notice of what the EEOC believes is necessary to achieve compliance.[19]

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[15] *See EEOC v. Sears, Roebuck & Co.*, 650 F.2d 14, 19 (2d Cir. 1981) ("[I]t was not the intention of Congress that the Commission could attempt conciliation on one set of issues and having failed, litigate a different set.") (citation and internal quotation marks omitted).

[16] *See Patterson*, 535 F.2d at 271-72; *EEOC v. Am. Nat'l Bank*, 652 F.2d 1176, 1186 (4th Cir. 1981) (dicta); *EEOC v. Sherwood Med. Indus., Inc.*, 452 F. Supp. 678, 682 (M.D. Fla. 1978).

[17] *See Hill v. Western Elec. Co., Inc.*, 672 F.2d 381, 390 n.6 (4th Cir. 1982).

[18] *See Sears, Roebuck & Co.*, 650 F.2d at 18-19.

[19] *See EEOC v. Klingler Elec. Corp.*, 636 F.2d 104-07 (5th Cir. Unit A Feb. 1981); *Marshall*, 605 F.2d at 1334.

- Providing the defendant with a reasonable amount of time to review and respond to a conciliation offer.[20]
- Providing an explanation for how the Commission arrived at the amount of monetary relief it has demanded.[21]
- Providing information needed to evaluate the Commission's demands, including identifying the individuals for whom it seeks equitable relief, such as reinstatement, so that the employer can evaluate their qualifications.[22]

b. To the extent the Seventh Circuit was dissatisfied with the case-by-case approach undertaken by the other circuits, that is in large part the EEOC's own doing.

The Commission has authority to issue "suitable procedural regulations to carry out" Title VII. 42 U.S.C. § 2000e-12(a). Using that authority, the Commission has previously defined in greater detail standards for complying with the statute's other preconditions to litigation, including filing the initial charge,[23] serving the charge on the employer,[24]

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[20] *See EEOC v. Zia Co.*, 582 F.2d 527, 534 (10th Cir. 1978).

[21] *EEOC v. High Speed Enter., Inc.*, 2010 WL 8367452, at *5 (D. Ariz. Sept. 30, 2010); *see also EEOC v. Ruby Tuesday, Inc.*, 919 F. Supp. 2d 587 (W.D. Pa. Jan. 22, 2013) (ADEA case).

[22] *EEOC v. First Midwest Bank, N.A.*, 14 F. Supp. 2d 1028, 1031-32 (N.D. Ill. 1998).

[23] 29 C.F.R. §§ 1601.9, 1601.12

[24] *Id.* § 1601.14.

investigating the charge,[25] issuing of no-cause or reasonable-cause determinations,[26] and issuing right-to-sue letters.[27] If it is unhappy with how the courts have construed the Commission's conciliation obligations, there is no reason why the agency could not likewise issue regulations addressing that question. *See, e.g.*, *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 397 (2008) (deferring to EEOC's regulations defining "charge"); *Litton Fin. Printing Div.*, 501 U.S. at 200 (deferring to National Labor Relations Board's interpretation of National Labor Relations Act's requirement that unions and employers bargain in good faith).

Indeed, that is the path this Court took in *Shell Oil*. As noted earlier, in that case, this Court held that filing of a proper charge was a judicially enforceable prerequisite to the Commission's authority to issue administrative subpoenas or seek their enforcement in federal court. 466 U.S. at 65. There was no question in that case that a charge had been filed; the employer argued, instead, that the charge was inadequate because it did not include sufficient factual detail. *Id.* at 67. Rather than conclude that compliance with the statute was judicially unreviewable, this Court deferred to the EEOC's regulations defining the required contents of a charge. *Id.*

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[25] *Id.* §§ 1601.15-.17.

[26] *Id.* §§ 1601.18-.21.

[27] *Id.* § 1601.28.

Of course, in this case, the Commission has decided that its interests lie in declining to identify any standard of conduct that would bind *it* in conciliation proceedings.[28] That is not because the task is impossible – the Commission has itself solicited comments on a Draft Quality Control Plan intended to be used internally for "evaluating the quality of EEOC investigations and conciliations."[29] While it may be understandable that the Commission would prefer to issue non-binding quality control principles rather than enforceable regulations, that is no reason to allow the agency to thereby avoid judicial review of its compliance with statutory preconditions to litigation.

4. Finally, the court of appeals considered it unwise to allow defendants to seek judicial enforcement of the Commission's conciliation obligation because, it hypothesized, employers would act in bad faith, seeking to "use the conciliation process to undermine enforcement of Title VII rather than to take the conciliation process seriously as an opportunity to resolve a dispute." Pet. App. 16a. But the court cited no basis for that claim in the experience of the circuits that have subjected

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[28] The EEOC has issued brief regulations addressing the conciliation process, but in describing the Commission's obligations, the regulations do little more than repeat the relevant statutory language. *See* 29 C.F.R. § 1601.24.

[29] *See* EEOC, Press Release, *U.S. Equal Employment Opportunity Commission Quality Control Plan 2013 Draft Principles*, *available at* http://www.eeoc.gov/eeoc/newsroom/release/quality_controlplan_2013.cfm.

conciliation to judicial review for the past three-and-a-half decades. And, in fact, that experience shows that judicial review is essential to ensuring that the conciliation process provides a real opportunity for resolving claims quickly and fairly, without resort to litigation. Absent a minimal level of good-faith cooperation from the EEOC, the conciliation process has no real prospect for success.

For example, few employers will be willing to simply accede to the Commission's monetary demands – sometimes for millions of dollars – without being given some idea of how the EEOC arrived at the number, some indication of the number of individuals for whom that relief is sought, and reason to think that the Commission has a legal basis for seeking that relief. Although the Commission will have issued a reasonable cause determination prior to conciliation efforts, that determination generally does not provide that information. In this case, for example, the initial charge made no class allegations and the reasonable cause determination stated only that the Commission found grounds to believe that "a class of female applicants" had also been subject to discrimination. *See* Mot. for Sum. Judg., R. 32-1, Ex. B. The determination said nothing about how many women were included in the class, or even how the Commission had defined the class for which it would be seeking a remedy. Were the EEOC then to demand a large sum of money during conciliation talks, without providing that withheld information, the employer would have no means of assessing the reasonableness of the offer, and therefore no responsible basis to accept it. Yet, the Commission previously has employed just that tactic – presenting

defendants with "take-it-or-leave-it" demands for sometimes millions of dollars without providing any meaningful explanation as to how that number was derived. *See, e.g.*, *EEOC v. Ruby Tuesday, Inc.*, 919 F. Supp. 2d 587, 595-98 (W.D. Pa. 2013) (EEOC made demand for more than $6 million in ADEA case without providing employer the "basis for that monetary demand" and giving it only nine days to respond with its best offer or face-to-face meeting); *EEOC v. Reeves*, No. CV0010515DT(RZX), 2002 WL 1151459, at *7 (C.D. Cal. May 6, 2002) (awarding attorney's fees against EEOC, when the Commission ended negotiations after the employer failed to accept agency's initial demand of "payment of $1 million in compensatory and punitive damages and reinstatement of individuals whose identities were unknown to Defendant" even "while refusing to provide even the most essential facts underlying its claims against Defendant"), *rev'd on other grounds*, 68 Fed. Appx. 830 (9th Cir. 2003).

While the court of appeals was skeptical of employers' interest in good faith conciliation, it was willing to assume that the Commission could be trusted to comply with the law, even without any judicial oversight. Pet. App. 20a-21a. But the long-standing presumption in favor of judicial review of agency action is premised on the opposite understanding: "Without judicial review, statutory limits would be naught but empty words." *Bowen*, 476 U.S. at 672 n.3 (citation omitted); *see also, e.g.*, *Barlow v. Collins*, 397 U.S. 159, 167 (1970) ("[U]nless members of the protected class may have judicial review the statutory objectives might not be realized."). And in this case, the historical record

bears out that presumption. While the EEOC may litigate relatively few claims, even among those it failed to conciliate successfully, *see* Pet. App. 20a, that relatively small body of litigation has given rise to a distressing number of cases in which courts have found a lack of good-faith attempts to conciliate by the agency.[30]

Moreover, the need for judicial review of conciliation efforts is particularly acute in cases, like this one, raising pattern or practice claims and seeking class-wide relief (a type of litigation the EEOC has identified as one of its "top priorities").[31] The successful conciliation of such claims can bring important relief to large numbers of individuals while avoiding the especially long delays that too often accompany such complicated and high-stakes litigation. But precisely because the stakes are so high, employers are predictably unwilling to resolve the cases without the kind of basic information and process that judicial enforcement of the Commission's conciliation obligations has until now secured. At the same time, the risk that agency lawyers will

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[30] *See, e.g.*, *EEOC v. CRST Van Expedited*, 679 F.3d 657, 671-72 (8th Cir. 2012); *EEOC v. Agro Distribution, LLC*, 555 F.3d 462, 468 (5th Cir. 2009); *EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1258-61 (11th Cir. 2003); *Sears, Roebuck & Co.*, 650 F.2d at 18-19; *Zia Co.*, 582 F.2d at 530-34; *Patterson*, 535 F.2d at 271-72; *EEOC v. Pet, Inc., Funsten Nut Div.*, 612 F.2d 1001, 1002 (5th Cir. 1980); *supra* 21 n.12 (collecting district court cases).

[31] *See* EEOC, U.S. Equal Employment Opportunity Commission Strategic Enforcement Plan FY 2013 2016 § IV.A.3, *available at* http://www.eeoc.gov/eeoc/plan/sep.cfm.

sometimes give conciliation short shrift can be very real – because bringing such cases is an agency priority, some officials may be more interested in filing a lawsuit than in achieving a less high-profile resolution of the case. *See, e.g.*, *Asplundh*, 340 F.3d at 1261 (noting that the "chronology of events in this case lend themselves to the interpretation that the Commission's haste may have been motivated, at least in part, by the fact that conciliation, *unlike litigation*, is not in the public domain. We note that the record reveals that the EEOC office in Miami, which is prosecuting this case, has apparently already made public by way of comments to the *New York Times* that this case involves the allegations of a noose incident.").

Ultimately, however, the Court need not impugn the general motives or good faith of the Commission to decide that nothing in the statute overcomes the ordinary presumption that statutory preconditions to suit are subject to judicial enforcement.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 13-2456

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellant,

v.

MACH MINING, LLC,

Defendant-Appellant,

Appeal from the United States District Court for the Southern District of Illinois.
No. 3:11-cv-879 – **J. Phil Gilbert**, *Judge*.

ARGUED OCTOBER 29, 2013 – DECIDED DECEMBER 20, 2013

Before: WOOD, *Chief Judge*, and KANNE and HAMILTON, *Circuit Judges*.

HAMILTON, *Circuit Judge*. Title VII of the Civil Rights Act of 1964 directs the Equal Employment Opportunity Commission to try to negotiate an end to

an employer's unlawful employment practices before suing for a judicial remedy. 42 U.S.C. § 2000e–5(b).Mach Mining, LLC, the target of an EEOC lawsuit for sex discrimination in hiring, sees in this statutory instruction an implied affirmative defense in its discrimination case. Mach Mining seeks dismissal of the EEOC's suit on the ground that the agency failed to engage in good-faith conciliation before filing suit. The EEOC moved for summary judgment on this "failure-to-conciliate" defense, arguing that courts should look no further than the face of the complaint to review the sufficiency of the conciliation process itself. The district court denied that motion but certified for interlocutory appeal the question whether an alleged failure to conciliate is subject to judicial review in the form of an implied affirmative defense to the EEOC's suit.

We reverse the district court's denial of summary judgment on the affirmative defense. The language of the statute, the lack of a meaningful standard for courts to apply, and the overall statutory scheme convince us that an alleged failure to conciliate is not an affirmative defense to the merits of a discrimination suit. Finding in Title VII an implied failure-to-conciliate defense adds to that statute an unwarranted mechanism by which employers can avoid liability for unlawful discrimination. They can do so through protracted and ultimately pointless litigation over whether the EEOC tried hard enough to settle. An implied failure-to-conciliate defense also runs flatly contrary to the broad statutory prohibition on using what was said and done during the conciliation process "as evidence in a subsequent proceeding." 42 U.S.C. § 2000e–5(b). We therefore

disagree with our colleagues in other circuits and hold that the statutory directive to the EEOC to negotiate first and sue later does not implicitly create a defense for employers who have allegedly violated Title VII.

Factual and Procedural Background

The EEOC received a charge of discrimination in early 2008 from a woman who claimed Mach Mining had denied a number of her applications for coal mining jobs because of her gender. After investigating the charge, the agency determined there was reasonable cause to believe Mach Mining had discriminated against a class of female job applicants at its mine near Johnston City, Illinois. In late 2010, the EEOC notified the company of its intention to begin informal conciliation. The parties discussed possible resolution but did not reach an agreement. In September 2011, the EEOC told Mach Mining that it had determined the conciliation process had been unsuccessful and that further efforts would be futile. The EEOC filed its complaint in the district court two weeks later. There is no challenge here to the facial sufficiency of these documents. See *EEOC v. Shell Oil Co.*, 466 U.S. 54, 81, 104 S.Ct. 1621, 80 L.Ed.2d 41 (1984).

Mach Mining's answer denied unlawful discrimination and asserted several affirmative defenses. The only defense relevant to this appeal is the allegation that the suit should be dismissed because the EEOC failed to conciliate in good faith. The parties have spent nearly two years sparring over whether this is a sufficient ground for dismissing the discrimination case. The defense has been the subject of extensive discovery requests by

Mach Mining seeking information about the EEOC's investigation and conciliation efforts. The defense has also slowed discovery on the merits of the underlying discriminatory hiring claim. Mach Mining has asserted failure to conciliate as a basis for objecting to a number of the EEOC's discovery requests. The EEOC moved for summary judgment solely on the issue of whether, as a matter of law, an alleged failure to conciliate is an affirmative defense to its suit for unlawful discrimination.

In denying the EEOC's motion, the district court held that courts should evaluate conciliation to the extent needed to "determine whether the EEOC made a sincere and reasonable effort to negotiate." *EEOC v. Mach Mining, LLC*, 2013 WL 319337, at *5 (S.D.Ill. Jan. 28, 2013) (internal quotations omitted). Because the EEOC had not argued that its efforts were either sincere or reasonable, only that they were not reviewable as a defense to unlawful discrimination, the district court had no occasion to demonstrate what its proposed standard might mean in practice. The district court followed decisions of other circuits holding (and sometimes simply assuming) that judicial review of conciliation is appropriate in the form of an affirmative defense. See *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657 (8th Cir. 2012); *EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256 (11th Cir. 2003); *EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529 (2d Cir. 1996); *EEOC v. Keco Indus., Inc.*, 748 F.2d 1097 (6th Cir. 1984); *EEOC v. Klingler Elec. Corp.*, 636 F.2d 104 (5th Cir. 1981); *EEOC v. Radiator Specialty Co.*, 610 F.2d 178 (4th Cir. 1979); *EEOC v. Zia Co.*, 582 F.2d 527 (10th Cir. 1978).

The district court recognized at the same time that the EEOC's position had merit and raised arguments not considered by other circuits. It thus certified for interlocutory appeal under 28 U.S.C. § 1292(b) whether and to what extent conciliation is judicially reviewable through an implied affirmative defense. We accepted the appeal because it presents a controlling question of law as to which there is substantial ground for difference of opinion, because the resolution may advance the ultimate termination of the case, and because of the importance of the issue.

Analysis

In evaluating whether Mach Mining has a legally viable affirmative defense for failure to conciliate, we consider (1) the statutory language, (2) whether there is a workable standard for such a defense, (3) whether the defense might fit into the broader statutory scheme, and (4) our relevant case law. We then review (5) the decisions of other courts recognizing the affirmative defense that we reject here.

I. *Statutory Language*

We begin our analysis, of course, with the text of the statute, mindful of the Supreme Court's recent admonition that "Congress' special care in drawing so precise a statutory scheme" as Title VII "makes it incorrect to infer that Congress meant anything other than what the text does say." *University of Texas Southwestern Med. Ctr. v. Nassar*, 133 S.Ct. 2517, 2530, 186 L.Ed.2d 503 (2013). The text of Title VII contains no express provision for an affirmative defense based on an alleged defect in the EEOC's

conciliation efforts. In "the context of a statute as precise, complex, and exhaustive as Title VII," *id.*, this silence itself is compelling. We do not rely only on that silence, however. We are also persuaded by the express statutory language making clear that conciliation is an informal process entrusted solely to the EEOC's expert judgment and that the process is to remain confidential.

The EEOC's enforcement procedures under Title VII are spelled out in section 706 of the Civil Rights Act of 1964 as amended. 42 U.S.C. § 2000e–5. The process begins when the agency receives a charge of discrimination from an aggrieved employee or a Commission member. It then must notify the employer and investigate whether reasonable cause exists to support the allegations.

A finding of cause triggers the conciliation process: "If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." § 2000e–5(b). The EEOC may sue only after it "has been unable to secure from the respondent a conciliation agreement acceptable to the Commission." § 2000e–5(f)(1). Title VII allows the entire process to move fairly quickly, at least in some cases. The only time limit on the EEOC's ability to sue is that it not do so within the first 30 days after receiving the original charge. See § 2000e–5(f)(1); *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 360, 97 S.Ct. 2447, 53 L.Ed.2d 402 (1977).

The words are significant: "*endeavor to eliminate*" discriminatory practices "by *informal methods* of conference, conciliation, and persuasion." § 2000e–5(b). If it is "unable to secure from the respondent a conciliation agreement *acceptable to the Commission*," the agency may then sue. § 2000e–5(f)(1). What we have then is an instruction to the EEOC to try, by whatever methods of persuasion it chooses short of litigation, to secure an agreement that the agency in its sole discretion finds acceptable. It would be difficult for Congress to have packed more deference to agency decision-making into so few lines of text.

The only other statutory terms in Title VII addressing the conciliation process make all details of the conciliation process strictly confidential. Violators are even subject to criminal prosecution: "Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both." § 2000e–5(b)..

An implied affirmative defense for failure to conciliate conflicts directly with the confidentiality provision. See generally *United States v. Misc. Firearms*, 376 F.3d 709, 712 (7th Cir. 2004) (courts should avoid interpretations that "render other

provisions of the statute inconsistent, meaningless, or superfluous").[1]

The statute's explicit prohibition against using the contents of conciliation as evidence in a later proceeding is broad. Unlike Federal Rule of Evidence 408(b) regarding evidence of settlement negotiations, Title VII contains no exception allowing such information to be admitted for a collateral purpose,

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[1] The parties dispute whether the criminal provision applies equally to the EEOC and to employers, as well as whether it would penalize using information as evidence if it is filed under seal (and thus arguably not "made public"). Case law on these questions is scattered and inconsistent. Compare *EEOC v. LifeCare Mgmt. Servs., LLC*, No. 02:08–CV–1358, 2009 WL 772834 (W.D.Pa. Mar. 17, 2009) (district judge recused after viewing conciliation documents that were filed under seal and became subject of dispute; court relied on confidentiality provision but did not consider how it might apply to the entire failure-to-conciliate defense), with *EEOC v. First Midwest Bank, NA*, 14 F.Supp.2d 1028 (N.D.Ill.1998) (recounting at length the procedural and substantive details of parties' conciliation efforts, without any mention of confidentiality). But we need not explore all subtleties of the criminal provision here. Also, the EEOC has produced evidence related to conciliation efforts before courts that have recognized the failure-to-conciliate defense. These actions appear to have been efforts to comply with conflicting and, we believe, mistaken interpretations of the law. The EEOC has not waived its right to argue that the failure-to-conciliate defense is mistaken at its foundation.

such as to satisfy a court that the EEOC's efforts to conciliate were sufficient. Implying a failure-to-conciliate defense in Title VII would thus require courts to evaluate conciliation without evidence to weigh, at least without the consent of both parties. An alternative but no more persuasive solution to the problem would be first to imply this affirmative defense and then to construct an implied set of exceptions to the sweeping statutory requirement of confidentiality. The better reading is to avoid the conflict, stick to the text, and reject both the nonstatutory affirmative defense and the nonstatutory exceptions to confidentiality.

II. *No Standard for Review*

The second major problem with an implied failure-to-conciliate defense is the lack of a meaningful standard to apply. Title VII says nothing about the informal methods the EEOC is required to use—must it involve all three of conference, conciliation, and persuasion?—or how hard the agency should "endeavor" to pursue them. The statute gives no description of what a negotiated settlement should look like beyond eliminating the discriminatory conduct. And the statute gives the agency complete discretion to accept or reject an employer's offer for any reason. Such an open-ended provision looks nothing like a judicially reviewable prerequisite to suit.

Nor can Mach Mining explain just how many offers, counteroffers, conferences, or phone calls should be necessary to satisfy judicial review, despite repeated invitations to provide the court with a workable standard. In its brief, the company says review would sometimes require the EEOC to

respond to employers' requests for more information, but sometimes not. Sometimes the agency would have to show how it calculated monetary damages, but sometimes not. Sometimes it would have to identify all individual complainants, identify potential new hires, or agree to face-to-face meetings, but sometimes not. The defendant's uncertainty is consistent with the cases that have recognized this affirmative defense, but we are not tempted to send district courts down such a dimly lighted path.[2]

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[2] Courts applying a failure-to-conciliate defense have varied widely in what evidence they consider and what actions they require of the EEOC. Must the EEOC identify all claimants during conciliation? Compare *EEOC v. Swissport Fueling, Inc.*, 916 F.Supp.2d 1005, 1037–38 (D.Ariz.2013) (yes), with *EEOC v. Scolari Warehouse Mkts., Inc.*, 488 F.Supp.2d 1117, 1129 n. 14 (D.Nev.2007) (no). Must the EEOC provide during conciliation the basis for its damages demand? Compare *EEOC v. Bloomberg LP*, 751 F.Supp.2d 628, 641–42 (S.D.N.Y.2010) (yes, agency must provide more than "basic information"), with *EEOC v. Hibbing Taconite Co.*, 266 F.R.D. 260, 274 (D.Minn.2009) (no), and *EEOC v. Riverview Animal Clinic, PC*, 761 F.Supp.2d 1296, 1302 (N.D.Ala.2010) (agency can "negotiate in good faith even if it does not have an accurate final computation of actual damages"). Is the substantive reasonableness of the EEOC's settlement position relevant? Compare *EEOC v. Agro Distribution, LLC*, 555 F.3d 462, 468 (5th Cir. 2009) (finding failure to conciliate based in part on substance of agency's "insupportable" settlement demand), with *EEOC v. High Speed Enter., Inc.*, No. CV–08–01789, 2010 WL 8367452, at *5 (D.Ariz. Sept. 30, 2010) (disclaiming any reliance on value of agency's settlement offer). May the EEOC raise

In the absence of any statutory guide, some courts that have approved the implied affirmative defense for failure to conciliate have imposed a requirement of good faith. *E.g.*, *Keco Indus.*, 748 F.2d at 1102; *Zia Co.*, 582 F.2d at 533. Mach Mining argues that the National Labor Relations Act offers a template for how courts should analyze good faith in this context, and some courts have indeed relied on the NLRA for guidance in evaluating Title VII conciliation. *E.g.*, *Zia Co.*, 582 F.2d at 533.

Unlike Title VII, however, the NLRA contains an explicit statutory command to employers and unions to negotiate in good faith, 29 U.S.C. § 158(d), so courts have done their best to enforce that explicit command. We have warned about the problems of applying such a standard to a process like conciliation under Title VII: "We know from cases under the National Labor Relations Act, which requires unions and employers to bargain in good faith, how difficult it is to enforce such a duty, because it jostles uneasily with the right of each party to a labor negotiation to refuse an offer by the other even if a neutral observer would think it a fair, even a generous, offer." *Doe v. Oberweis Dairy*, 456

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its damages demand significantly? Compare *EEOC v. PBM Graphics Inc.*, 877 F.Supp.2d 334, 363 (M.D.N.C.2012) (agency's sudden quintupling of monetary demands was not failure to conciliate), with *EEOC v. First Midwest Bank, NA*, 14 F.Supp.2d 1028, 1032 (N.D.Ill.1998) (agency's sudden quadrupling of monetary demands showed failure to conciliate).

F.3d 704, 711 (7th Cir. 2006) (internal citations omitted); see also *Nassar*, 133 S.Ct. at 2530 (Title VII's "detailed statutory scheme" should not be read in light of "capacious language" of other statutes).

The parties here agree that, like a party to a labor negotiation, the EEOC is free to refuse an offer that might appear fair or even generous to a neutral observer. Courts that have recognized an implied affirmative defense for failure to conciliate draw a distinction between review of the conciliation process, which they permit, and review of the substance of the EEOC's position, which is supposedly prohibited. See, *e.g.*, *EEOC v. Hibbing Taconite Co.*, 266 F.R.D. 260, 273 (D.Minn.2009) ("While the substance and details of any settlement offers, or discussions, are not discoverable, the actions and efforts, that are undertaken by the EEOC to conciliate the matter ... are subject to the Court's review.").

But the distinction between process and substance in this context is unlikely to survive the adversarial crucible of litigation. A court reviewing whether the agency negotiated in good faith would almost inevitably find itself engaged in a prohibited inquiry into the substantive reasonableness of particular offers—not to mention using confidential and inadmissible materials as evidence—unless its review were so cursory as to be meaningless. Was it unreasonable for the EEOC to refuse one more meeting, one more request for information, or one more extension of time to respond, or to raise its settlement demand? So unreasonable as to permit an inference of bad faith? These questions cannot be answered without a close look at the substance of the parties' positions, yet all agree that Title VII leaves

the choice to settle or not entirely to the EEOC's unreviewable discretion.

While Mach Mining did not plead its conciliation defense under the Administrative Procedure Act, its argument relies heavily on the statute's "basic presumption of judicial review" that is so central to American law in general and the APA in particular. See *Abbott Labs. v. Gardner*, 387 U.S. 136, 140, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967), abrogated in part on other grounds, *Califano v. Sanders*, 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977). The APA thus casts a helpful light because the lack of a workable standard for courts to apply makes conciliation look very much like an action "committed to agency discretion by law," which the APA excepts from its general presumption of judicial review. See 5 U.S.C § 701(a); cf. § 704 (only actions "made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review"). Under this exception, court involvement "is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Webster v. Doe*, 486 U.S. 592, 600, 108 S.Ct. 2047, 100 L.Ed.2d 632 (1988), quoting *Heckler v. Chaney*, 470 U.S. 821, 830, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985).

3 Under the APA, this exception is generally narrow. It applies only "if a careful analysis of the statutory language, statutory structure, legislative history, and the nature of the agency action requires it." *Home Builders Ass'n of Greater Chicago v. U.S. Army Corps of Engineers*, 335 F.3d 607, 615 (7th Cir. 2003). Nevertheless, the exception is not so narrow as

to disappear entirely into the rule, and we have applied it where the statutory text and structure as well as the nature of the agency decision so demand. See *Anaya-Aguilar v. Holder*, 683 F.3d 369, 373 (7th Cir. 2012); *Singh v. Moyer*, 867 F.2d 1035, 1038–39 (7th Cir. 1989); *Board of Trade of City of Chicago v. Commodity Futures Trading Comm'n*, 605 F.2d 1016, 1025 (7th Cir. 1979). We need not do so directly here because, again, Mach Mining has not explicitly grounded its defense in the APA. But our reasoning is consistent with the APA exception because the statutory directive to attempt conciliation is so similar to those open-ended grants of authority that courts have found committed to agency discretion by law and thus not subject to judicial review under the APA.

To be sure, the presumption favoring judicial review is not limited to the APA. It extends to cases such as this one, in which the agency action is not being challenged under the APA. In *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 106 S.Ct. 2133, 90 L.Ed.2d 623 (1986), the Supreme Court considered a non-APA challenge to regulations setting out how to calculate Medicare Part B benefits. Noting the "strong presumption" in favor of review, *id.* at 670, 106 S.Ct. 2133, the Court held the regulations were judicially reviewable. It distinguished an earlier case that said individual benefit computations were unreviewable because the challenge in *Bowen* was to a general agency rulemaking and thus presented less danger of flooding courts with burdensome litigation in contravention of the statutory scheme. *Id.* at 675–76.

Similarly, in *Traynor v. Turnage*, 485 U.S. 535, 108 S.Ct. 1372, 99 L.Ed.2d 618 (1988), the Court applied the presumption of judicial review to petitioners' challenge to a Veterans' Administration regulation that allegedly violated the Rehabilitation Act of 1973. *Traynor* explained that the challenge to the particular regulation's lawfulness would not drag courts into complex, fact-specific determinations or open the door to "expensive and time-consuming litigation" over individual claims. *Id.* at 544–45, 108 S.Ct. 1372. The broader challenge to the regulation was thus not barred by an earlier case finding that Congress had expressly precluded review of individual veteran benefits awards.

While upholding judicial review in each case, both *Bowen* and *Traynor* acknowledged that the general "presumption favoring judicial review of administrative action is just that—a presumption." *Block v. Community Nutrition Inst.*, 467 U.S. 340, 349, 104 S.Ct. 2450, 81 L.Ed.2d 270 (1984), cited in *Bowen*, 476 U.S. at 673, 106 S.Ct. 2133, and *Traynor*, 485 U.S. at 542, 108 S.Ct. 1372. It may be overcome "whenever the congressional intent to preclude judicial review is fairly discernible in the statutory scheme." *Block*, 467 U.S. at 351, 104 S.Ct. 2450 (internal quotations omitted); see also *Morris v. Gressette*, 432 U.S. 491, 504–05, 97 S.Ct. 2411, 53 L.Ed.2d 506 (1977).

Unlike the pure questions of law the Supreme Court found reviewable in *Traynor* and *Bowen*, case-by-case adjudication of the sufficiency of the EEOC's conciliation efforts would require that courts be given some metric by which to analyze the parties' conduct. Congress's failure to provide even the outlines of such

a standard tends to show that it did not intend for judicial review of conciliation through an implied affirmative defense. This conclusion becomes compelling when considered alongside the language of the statute, including the prohibition on evidence from the conciliation process. Judicial review under the implied affirmative defense would have to proceed without a workable legal standard and even without evidence.

III. *Review Undermines Conciliation*

An implied affirmative defense for failure to conciliate also does not fit well with the broader statutory scheme of Title VII. Offering the implied defense invites employers to use the conciliation process to undermine enforcement of Title VII rather than to take the conciliation process seriously as an opportunity to resolve a dispute. The Supreme Court has recognized "Congress's intent that voluntary compliance be the preferred means of achieving the objectives of Title VII." *Ricci v. DeStefano*, 557 U.S. 557, 581, 129 S.Ct. 2658, 174 L.Ed.2d 490 (2009) (internal quotations omitted). In 1972 Congress gave the EEOC the new power to bring suit in order to spur more voluntary compliance. *EEOC v. Kimberly–Clark Corp.*, 511 F.2d 1352, 1357 (6th Cir. 1975). Congress's purpose is not served well by litigating the parties' informal endeavors at "conference, conciliation, and persuasion." Simply put, the conciliation defense tempts employers to turn what was meant to be an informal negotiation into the subject of endless disputes over whether the EEOC did enough before going to court. Such disputes impose significant costs on both sides, as well as on the court, and to what end?

All the employer should legitimately hope to gain is some unspecified quantum of additional efforts at conciliation by the EEOC. The result of such a defense, as we have said in a closely related context, is to "protract and complicate Title VII litigation, and with little or no offsetting benefit." *Oberweis Dairy*, 456 F.3d at 710 (reversing summary judgment for employer; complaining party's failure to cooperate did not provide employer with affirmative defense); see also *EEOC v. Chicago Miniature Lamp Works*, 526 F.Supp. 974, 975–76 (N.D.Ill.1981) (discussing at length "undesirability of turning every properly-filed EEOC action into a two-fold action" by litigating first the EEOC's probable cause finding and then the actual merits).

Of course, we doubt that many employers will go to the trouble of putting on a failure-to-conciliate defense purely out of a desire to see their adversary across the negotiating table again. What most hope to win is dismissal of the case, or at least its delay. See, *e.g.*, *Asplundh Tree*, 340 F.3d at 1261; *EEOC v. Bloomberg LP*, —— F.Supp.2d ——, ——, 2013 WL 4799150, at *10–11 (S.D.N.Y. Sept. 9, 2013) (dismissing case while acknowledging that meritorious discrimination claims "now will never see the inside of a courtroom").

If an employer engaged in conciliation knows it can avoid liability down the road, even if it has engaged in unlawful discrimination, by arguing that the EEOC did not negotiate properly—whatever that might mean—the employer's incentive to reach an agreement can be outweighed by the incentive to stockpile exhibits for the coming court battle. Similar reasoning explains why Title VII makes negotiations

confidential in the first place. See *Branch v. Phillips Petroleum Co.*, 638 F.2d 873, 881 (5th Cir. 1981) ("the prospect of disclosure or possible admission into evidence of proposals made during conciliation efforts would tend to inhibit the kind of free and open communication necessary to achieve unlitigated compliance with the requirements of Title VII").

An employer cannot be sure in advance that its defense will carry the day, of course. But the cost to the employer of pursuing that defense rather than settling before suit is filed is likely to be relatively low—a civil complaint from the EEOC, perhaps accompanied by a negative press release—because the employer remains free to settle after the EEOC files suit. The potential gains of escaping liability altogether will, in some cases, more than make up for the risks of not engaging in serious attempts at conciliation. And the stronger the EEOC's case on the merits, the stronger the incentive to use a failure-to-conciliate defense. We see no persuasive reason to find that a statute meant to encourage voluntary compliance on the part of employers implied a defense that would create such contrary incentives for them. See generally *EEOC v. Shell Oil Co.*, 466 U.S. 54, 81, 104 S.Ct. 1621, 80 L.Ed.2d 41 (1984) (rejecting employer's effort to litigate adequacy of EEOC's disclosure of facts supporting subpoena where such disputes would slow and undermine EEOC's enforcement efforts).

Mach Mining and the amici supporting it argue strenuously that judges must police the EEOC, lest it either abandon conciliation altogether or misuse it by advancing unrealistic and even extortionate settlement demands. Neither scenario is plausible.

We are not persuaded by Mach Mining's argument that EEOC field offices are so eager to win publicity or to curry favor with Washington by filing more lawsuits that they will needlessly rush to court.

First, in the context of deciding whether to imply private rights of action, the Supreme Court has repeatedly made clear that not every statutory directive is the subject of a private right of action. See generally *Sosa v. Alvarez–Machain*, 542 U.S. 692, 727, 124 S.Ct. 2739, 159 L.Ed.2d 718 (2004) ("this Court has recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases"); *Alexander v. Sandoval*, 532 U.S. 275, 286–87, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001) (without congressional "intent to create not just a private right but also a private remedy ... a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute").

The Court's reluctance to imply private rights of action would seem to apply with similar force to implied affirmative defenses, especially as defenses for violations of federal law where Congress provided expressly for the enforcement action itself. Using the standards for implied rights of action, there is no indication that Title VII's directive to conciliate was for the special benefit of employers or that they have a right to conciliation. Congress was focused on effective enforcement of the anti-discrimination standards of Title VII, not creating new rights for employers. See *Alexander*, 532 U.S. at 289, 121 S.Ct. 1511 ("Statutes that focus on the person regulated rather than the individuals protected create 'no

implication of an intent to confer rights on a particular class of persons.' "), quoting *California v. Sierra Club*, 451 U.S. 287, 294, 101 S.Ct. 1775, 68 L.Ed.2d 101 (1981).

Second, the agency has its own powerful incentives to conciliate, and the available data show that it does so. The EEOC currently processes and investigates nearly 100,000 charges of discrimination a year, but it ultimately files suit in only a few hundred cases. In fiscal year 2012, the agency attempted conciliation in 4207 cases, was unsuccessful in 2616, yet filed suit on the merits in just 122. All Statutes: FY 1997 Through FY 2012, http://www.eeoc.gov/eeoc/statistics/enforcement/all.cfm; EEOC Litigation Statistics, FY 1997 Through FY 2012, http://www.eeoc. gov/eeoc/statistics/enforcement/litigation.cfm (both sites last visited Dec. 20, 2013). That so few unsuccessful efforts at conciliation end up in court shows how constrained the agency is by practical limits of budget and personnel.

The agency's practices and priorities are also checked in this regard by the two other branches of government, making it less urgent for the judiciary to add its supervision, at least without a statutory command to do so. Although structured as an independent agency, the EEOC shares its enforcement authority with the Attorney General, see 42 U.S.C. § 2000e–5(f), and it is attuned to the policy priorities of the executive. See Neal Devins, *Political Will and the Unitary Executive: What Makes an Independent Agency Independent?*, 15 Cardozo L.Rev. 273, 297–98 (1993). As it can with other agencies, Congress can exert its influence on the EEOC

through oversight hearings, adjustments to appropriations, and statutory amendments. In addition, the commissioners who head the agency are appointed by the President with the advice and consent of the Senate. In short, even without the judiciary trying to monitor the EEOC's efforts at conciliation, those efforts are subject to meaningful scrutiny.

IV. *Applicable Seventh Circuit Case Law*

We turn next to our own decisions that provide some guidance on this question of an implied defense. We have not had occasion before this case to examine this particular question about an implied defense for failure to conciliate. But our rejection of the defense is consistent with our earlier cases rejecting similar attempts by employers to change the focus from their employment practices to the agency's pre-suit processes.

For example, in *EEOC v. Elgin Teachers Association*, 27 F.3d 292 (7th Cir. 1994), the EEOC sued a local teachers union for damages related to a collective bargaining agreement that the agency believed was discriminatory. Rejecting the union's claim that the EEOC "lacked the right" to sue, we noted that although "the EEOC must pursue conciliation, it failed to get all of what it wanted in bargaining." *Id.* at 294 (internal citations omitted). While we doubted whether the teachers union was the best target for suit, we made clear that the decision to go to court was "a matter for the conscience of the person who authorized the suit, rather than for the judiciary." *Id.* The same reasoning applies to judicial review of conciliation efforts.

More recently, in *Doe v. Oberweis Dairy*, 456 F.3d 704 (7th Cir. 2006), we held that the defendant employer was not entitled to summary judgment on the ground that the complainant, a former employee, had failed to cooperate with the EEOC before suit was filed. Although the EEOC requires complainants to cooperate with its investigations, we refused to read into Title VII a rule that good-faith cooperation was a prerequisite to individual suit or that failure to cooperate would be an affirmative defense. Nothing in the statutory text expressed any such requirement, and imposing it would needlessly complicate Title VII cases: "To allow employers to inject such an issue by way of defense in every Title VII case would cast a pall over litigation under that statute." *Id.* at 711. The same reasoning applies to a failure-to-conciliate defense.

EEOC v. Caterpillar, Inc., 409 F.3d 831 (7th Cir. 2005), is even more closely on point. In *Caterpillar*, the defendant employer had moved for partial summary judgment on the theory that the EEOC's complaint went beyond the scope of the investigation required by 42 U.S.C. § 2000e–5(b). We affirmed denial of summary judgment. Distinguishing cases with contrary dicta, we held that the "existence of probable cause to sue is generally and in this instance not judicially reviewable." 409 F.3d at 833. Nothing in the language of Title VII or our past case law invites courts to review the agency's finding of probable or reasonable cause, and the same is true of its approach to conciliation.

Mach Mining offers two grounds for distinguishing *Caterpillar*. It first argues that any error as to whether probable cause exists will be

corrected at trial while, absent court review, insufficient conciliation will remain forever unremedied. We are not persuaded. A trial will check defects in the conciliation process to the same extent it will a lack of probable cause. All an employer loses from deficient conciliation effort is the chance to comply with the discrimination laws without need for a trial, and we must keep in mind that the EEOC has complete discretion to decide whether to settle.

If the EEOC's demands are so high that they offer no real chance at bargaining, a trial on the merits should bring them back to earth. If the employer feels it lacked the time or information necessary to settle before suit is filed, litigation will provide both. The employer can still settle, and district courts have many tools available to encourage reasonable settlements. We see no reason the EEOC would be likely to prefer spending its limited litigation budget rather than accept success in the form of a reasonable settlement. Moreover, the parties can settle quickly and without court approval because EEOC suits are not considered representative actions subject to the requirements of Rule 23. See *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 288, 122 S.Ct. 754, 151 L.Ed.2d 755 (2002); cf. Fed.R.Civ.P 23(e). It is true that the employer may have to bear the burden of trial, but that is equally true in the probable cause context. Mach Mining asserts also that the existence of probable cause is particularly the subject of agency expertise in a way that a failure to conciliate is not. This claim, offered without further support or explanation, is no more persuasive.

Perhaps the closest our cases come to supporting a failure-to-conciliate defense is *EEOC v. Massey–Ferguson, Inc.*, 622 F.2d 271, 277 (7th Cir. 1980), where our discussion of a laches defense shows that some evidence from the conciliation process was offered and considered. We rejected the employer's attempt to require the EEOC to raise back-pay claims in conciliation as a condition of seeking back-pay in the lawsuit. Nevertheless, our discussion seems to have assumed some degree of judicial review might be available, and the evidence from the conciliation process was deemed relevant to a defense of laches. The parties did not make an issue of the conciliation process in *Massey–Ferguson*, however. Nor did they raise the issue of confidentiality or confront the issues of statutory text we address here. The opinion therefore adds little to Mach Mining's case here, while *Caterpillar*, *Oberweis Dairy*, and *Elgin Teachers Association* show our consistent skepticism toward employers' efforts to change the focus from their own conduct to the agency's pre-suit actions.

V. *Other Circuits*

Our decision makes us the first circuit to reject explicitly the implied affirmative defense of failure to conciliate. Because the courts of appeals already stand divided over the level of scrutiny to apply in reviewing conciliation, our holding may complicate an

existing circuit split more than it creates one, but we have proceeded as if we are creating a circuit split.[3]

As explained in more detail below, the Second, Fifth, and Eleventh Circuits evaluate conciliation under a searching three-part inquiry. *EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1259 (11th Cir. 2003); *EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529, 1534 (2d Cir. 1996); *EEOC v. Klingler Elec. Corp.*, 636 F.2d 104, 107 (5th Cir. 1981). The Fourth, Sixth, and Tenth Circuits require instead that the EEOC's efforts meet a minimal level of good faith. *EEOC v. Keco Indus., Inc.*, 748 F.2d 1097, 1102 (6th Cir. 1984); *EEOC v. Radiator Specialty Co.*, 610 F.2d 178, 183 (4th Cir. 1979); *EEOC v. Zia Co.*, 582 F.2d 527, 533 (10th Cir. 1978). While we respect the views of our colleagues in these circuits, we also recognize our duty to decide our cases independently and to disagree when we must. See, *e.g.*, *Atchison, Topeka & Santa Fe Ry. Co. v. Pena*, 44 F.3d 437, 443 (7th Cir. 1994), *aff'd sub nom. Bhd. of Locomotive Engineers v. Atchison, Topeka & Santa Fe R.R. Co.*, 516 U.S. 152, 116 S.Ct. 595, 133 L.Ed.2d 535 (1996); *Grandberry v. Keever*, 735 F.3d 616, 618 (7th Cir. 2013).

To the extent other courts have explained why judicial review of conciliation is appropriate in the

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[3] We have circulated this opinion among all judges of this court in regular active service pursuant to Circuit Rule 40(e). No judge favored a rehearing en banc on the question of rejecting the implied affirmative defense for failure to conciliate.

form of an implied affirmative defense to claims of unlawful discrimination, we are not persuaded to join them.[4] Few courts recognizing this implied defense have addressed the issue directly; those that have recognized it have pointed generally to a need to give effect to Congress's intention that the EEOC address discrimination through voluntary settlement. See, *e.g.*, *EEOC v. Bass Pro Outdoor World, LLC*, No. 4:11–CV–3425, 2013 WL 5515345, at *4 (S.D.Tex. Oct. 2, 2013); *Bloomberg LP*, ——F.Supp.2d at ——, 2013 WL 4799150, at *7. As we have explained, though, apart from the problems this poses under the statutory text, including the confidentiality requirement, we are also skeptical that court oversight is necessary or that it encourages

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[4] Nor are we persuaded by the arguments of Mach Mining's amici that Congress has implicitly "acquiesced" to these courts' long-standing interpretations. Amicus Br. of Retail Litig. Ctr., Inc., U.S. Chamber of Commerce, and Nat'l Fed. of Indep. Bus. at 18, citing *Block v. Community Nutrition Inst.*, 467 U.S. 340, 349, 104 S.Ct. 2450, 81 L.Ed.2d 270 (1984). *Block* discussed congressional inaction on the way to holding that courts could *not* review the challenged agency action, and in any event, the Supreme Court has since expressed considerable skepticism about this argument by acquiescence, regardless of which direction it runs. See *Alexander v. Sandoval*, 532 U.S. 275, 292–93, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001); *Central Bank of Denver, NA v. First Interstate Bank of Denver, NA*, 511 U.S. 164, 187, 114 S.Ct. 1439, 128 L.Ed.2d 119 (1994).

compliance rather than strategic evasion on the part of employers.

Given Title VII's deliberate silence concerning the details of conciliation, it is not surprising that other courts have struggled to provide meaningful guidance on how to judge the process. The approach adopted in the Fourth, Sixth, and Tenth Circuits proposes to inquire into the good faith of the EEOC's efforts. As we have explained, we see no reason to import a judicially reviewable requirement of good faith into the informal and confidential process of conciliation when the statute does not require it.

The Second, Fifth, and Eleventh Circuits employ an even more searching three-part test first announced in *Marshall v. Sun Oil Co. (Delaware)*, 605 F.2d 1331, 1335 (5th Cir. 1979). This test asks whether the EEOC: (1) outlined to the employer its cause for believing Title VII has been violated, (2) gave the employer a chance to comply voluntarily, and (3) responded "in a reasonable and flexible manner to the reasonable attitudes of the employer." *Asplundh Tree*, 340 F.3d at 1259.

This inquiry—especially the open-ended third step—appears to be no clearer in practice than on paper. It invites ad hoc assessments of whether the EEOC played fairly and took reasonable substantive positions. See note 2, above, collecting cases. Under either test, court review will conflict directly with the statute's confidentiality provision, as well as with its grant of discretion to the agency to accept or reject any particular offer to compromise.

Finally, a word on remedies. Even if there were a sound basis for disregarding the confidentiality

provision in Title VII and subjecting the EEOC's conciliation efforts to any form of judicial review, and even where the EEOC's conciliation effort has fallen short of judicial expectations, we see no sound basis for dismissing a case on the merits. Dismissal certainly is not required by the language of the statute, which says nothing to authorize judicial review in the first place and effectively prohibits it by making the relevant evidence inadmissible. See 42 U.S.C. § 2000e–5(b).

As a practical matter, there is little reason to expect the potential for dismissal to promote conciliation. The employer in a dismissed case has little incentive to resume talks, of course. The next employer the EEOC investigates will have seen the benefit of using the conciliation process as a strategic defense rather than a chance to settle. Dismissal also provides little additional deterrence against EEOC misconduct beyond what a stay or a referral to mediation could provide, and the significant social costs of allowing employment discrimination to go unaddressed in these situations are likely to outweigh any marginal gain in deterrence. Cf. *Hudson v. Michigan*, 547 U.S. 586, 594–96, 126 S.Ct. 2159, 165 L.Ed.2d 56 (2006) (holding that violation of "knock-and-announce" rule under Fourth Amendment did not require suppression of evidence where deterrence benefits would be outweighed by substantial social costs).

Because all parties acknowledge that the statute grants the EEOC discretion to reject any particular settlement offer, Mach Mining must argue that its failure to conciliate defense is a claim solely about process and not substance. This distinction seems too

fine a thread on which to hang judicial review. Cases applying both the tests for failure to conciliate slide easily from review of the form of conciliation toward more substantive scrutiny. Even setting aside this problem, the Supreme Court has made clear that, as a general rule, the remedy for a deficiency in a process is more process, not letting one party off the hook entirely. See, *e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 533, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004) (citizens classified as "enemy combatants" were entitled to notice and hearing before neutral arbiter, but not to release from detention); *Vitek v. Jones*, 445 U.S. 480, 495–97, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980) (prisoner was entitled to procedural safeguards before transfer to mental hospital, but not to immunity from transfer); *Fuentes v. Shevin*, 407 U.S. 67, 96–97, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972) (alleged debtors were entitled to hearing before prejudgment seizure of their property, but not to forgiveness of their debts).

The essence of an affirmative defense is that it assumes the plaintiff can prove its factual allegations. An affirmative defense raises additional facts or legal arguments that defeat liability nonetheless. See 2 Moore's Federal Practice 8.08[1] (3d ed.2013); see also 5 Wright & Miller, Federal Practice and Procedure § 1271, at 585 (3d ed.2004); *Sloan Valve Co. v. Zurn Industries, Inc.*, 712 F.Supp.2d 743, 756 (N.D.Ill.2010); *Menchaca v. American Medical Response of Illinois, Inc.*, 6 F.Supp.2d 971, 972 (N.D.Ill.1998). The wrong claimed by defendant here is purely one of insufficient process. A procedural remedy, such as a short stay to allow the parties to pursue conciliation further,

would be tailored to the alleged wrong. Dismissal on the merits, however, would excuse the employer's (assumed) unlawful discrimination. That would be too final and drastic a remedy for any procedural deficiency in conciliation.

We need not say more about remedies because we hold that alleged failures by the EEOC in the conciliation process simply do not support an affirmative defense for employers charged with employment discrimination. If the EEOC has pled on the face of its complaint that it has complied with all procedures required under Title VII and the relevant documents are facially sufficient, see *EEOC v. Shell Oil Co.*, 466 U.S. 54, 81, 104 S.Ct. 1621, 80 L.Ed.2d 41 (1984), our review of those procedures is satisfied. The EEOC is entitled to summary judgment on defendant Mach Mining's affirmative defense. The decision of the district court is REVERSED and the case is REMANDED for further proceedings on the merits.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)
Plaintiff,	)
vs.	) Case No. 11-cv-879-JPG-PMF
MACH MINING, LLC,	)
Defendant.	)

MEMORANDUM AND ORDER

This matter comes before the Court on plaintiff Equal Employment Opportunity Commission's ("EEOC") (1) motion for summary judgment on defendant Mach Mining, LLC's ("Mach Mining") failure to conciliate affirmative defense (Doc. 32); and (2) motion to strike "Section F" of Mach Mining's memorandum in opposition to the EEOC's motion for partial summary judgment (Doc. 45). For the following reasons, the Court denies the EEOC's motions.

1. Facts

The EEOC filed the instant suit on behalf of Brooke Petkas and a class of female applicants who had applied for non-office jobs at Mach Mining. According to the EEOC, Mach Mining "has never hired a single female for a mining-related position,"

and "did not even have a women's bathroom on its mining premises." Doc. 32, p. 1–2. The complaint alleges that Mach Mining's Johnston City, Illinois, facility engaged in a pattern or practice of unlawful employment practices since at least January 1, 2006. Specifically, those unlawful "practices included, but are not limited to failing or refusing to hire females into mining and related (non-office) positions because of their sex." Doc. 2, p. 2. The EEOC further alleges that Mach Mining "has utilized hiring practices that cause a disparate impact on the basis of sex" through its practice of "hiring only applicants who are referred by current employees." Doc. 2, p. 3. In its answer, Mach Mining asserted the affirmative defense that the EEOC failed to conciliate in good faith. The EEOC, in its instant motion for summary judgment, argues that *EEOC v. Caterpillar, Inc.*, 409 F.3d 831 (7th Cir. 2005) compels this Court to conclude that its conciliation process is not subject to judicial review.

2. Analysis

Summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Spath v. Hayes Wheels Int'l–Ind., Inc.*, 211 F.3d 392, 396 (7th Cir. 2000). With this standard in mind, the Court will consider the EEOC's argument that it is entitled to judgment as matter of law.

Upon the EEOC's receipt of a charge of discrimination, the EEOC must notice the employer of the charge, investigate the allegations, and make a

determination as to whether there is "reasonable cause" to believe the allegations took place. 42 U.S.C. § 2000e–5(b). Thereafter,

> [i]f the [EEOC] determines [ ] that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.

42 U.S.C. § 2000e-f(b). As a prerequisite to filing suit, EEOC must give the employer a chance to conciliate. *Id.*; 42 U.S.C. § 2000e–5(f)(1) ("If ... the [EEOC] has been unable to secure from the respondent a conciliation agreement acceptable to the [EEOC], the [EEOC] may bring a civil action ....").

"The [EEOC]'s duty to attempt conciliation is one of its most essential functions." *EEOC v. Radiator Specialty Co.*, 610 F.2d 178, 183 (4th Cir. 1979). Its conciliation attempt must be made in "good faith." *EEOC v. First Midwest Bank, N.A.*, 14 F.Supp.2d 1028, 1031 (N.D.Ill.1998) (citing *EEOC v. Keco Indus., Inc.*, 748 F.2d 1087, 1102 (6th Cir. 1984); *EEOC v. Zia Co.*, 582 F.2d 527, 533 (10th Cir. 1978)); *see also EEOC v. Dial Corp.*, 156 F.Supp.2d 926, 939 (N.D.Ill.2001). However, "[t]he judiciary's role in reviewing the conciliation process is limited, as the 'form and substance of the EEOC's conciliation proposals are within the agency's discretion and, therefore, immune from judicial second-guessing." *See First Midwest Bank, N.A.*, 14 F.Supp.2d at 1031. (citing *Keco Indus., Inc.*, 748 F.2d at 1102; *EEOC v. Acorn Niles Corp.*, No. 93–cv–5981, 1995 WL 519976, at *6 (N.D.Ill. Aug.30, 1995)).

Currently, there is a circuit split as to the scope of inquiry a court may make into the EEOC's statutory conciliation obligation. *See, e.g., EEOC v. St. Alexius Med. Ctr.*, 12–C–7646, 2012 WL 6590625, at *1 (N.D.Ill.Dec.18, 2012); *EEOC v. United Rd. Towing, Inc.*, No. 10–C–6259, 2012 WL 1830099, at *4 (N.D.Ill. May 11, 2012); *EEOC v. McGee Bros.*, No. 10–cv–142, 2011 WL 1542148, at *4 (W.D.N.C. Apr.21, 2011). Some circuits employee a "deferential standard" and others use a "heightened scrutiny standard." *United Rd. Towing, Inc.*, 2012 WL 1830099, at *4 (citing *EEOC v. McGee Bros.*, No. 10–cv–142, 2011 WL 1542148, at *4 (W.D.N.C. Apr.21, 2011)). The Sixth Circuit, for example, employs a deferential standard, holding that

> the district court should only determine whether the EEOC made an attempt at conciliation. The form and substance of those conciliations is within the discretion of the EEOC as the agency created to administer and enforce our employment discrimination laws and is beyond judicial review.

EEOC v. Keco Indus., Inc., 748 F.2d 1097, 1102 (6th Cir. 1984); *accord EEOC v. Radiator Specialty Co.*, 610 F.2d 178, 183 (4th Cir. 1979) (finding "the law ... requires no more than a good faith attempt at conciliation" and determining that the EEOC had provided such a good faith attempt after examining the various conciliation attempts); *EEOC v. Zia Co.*, 582 F.2d 527, 533 (10th Cir. 1978) ("a court should not examine the details of the offers and counteroffers between the parties, nor impose its notions of what the agreement should provide").

Other circuits, however, demand courts engage in a more strenuous review of the conciliation process. *EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256 (11th Cir. 2003). For instance, in order to satisfy the conciliation requirement in the Fifth and Eleventh Circuits

> [t]he EEOC must (1) outline to the employer the reasonable cause for its belief that Title VII has been violated; (2) offer an opportunity for voluntary compliance; and (3) respond in a reasonable and flexible manner to the reasonable attitudes of the employer.... "[T]he fundamental question is the reasonableness and responsiveness of the EEOC's conduct under all the circumstances."

Id. (quoting *EEOC v. Klingler Elec. Corp.*, 636 F.2d 104, 107 (5th Cir. 1981)). Accordingly, even though the circuits are split on the proper scope of a conciliation review, the courts that have weighed in on the matter agree that conciliation is subject to at least *some* level of review.

The Seventh Circuit has yet to weigh in on this circuit split. *See EEOC v. St. Alexius Med. Ctr.*, No. 12–cv–7646, 2012 WL 6590625, at *1 (N.D.Ill.Dec.18, 2012). However, district courts within the Seventh Circuit, like all other courts to have considered the issue, have concluded that the EEOC's conciliation process is subject to at least *some* level of review. *See, e.g., EEOC v. Menard, Inc.*, 08–cv–0655–DRH, 2009 WL 1708628, at *1 (S.D.Ill. June 17, 2009) (EEOC need only "make[ ] a sincere and reasonable effort to negotiate"); *EEOC v. Jillian's of Indianapolis, IN, Inc.*, 279 F.Supp.2d 974, 984–85 (S.D.Ind.2003); *EEOC v. Dial Corp.*, 156 F.Supp.2d 926, 941–42

(N.D.Ill.2001) (after considering the events of the conciliation process the court held it was "persuaded that the EEOC did, indeed, attempt to conciliate" because "[b]oth parties had the opportunity to put their respective proposals on the table before the EEOC determined that conciliation would be futile."); *EEOC v. First Midwest Bank, N.A.*, 14 F.Supp.2d 1028, 1031 (N.D.Ill.1998) (noting that "[i]f a district court finds improper conciliation efforts were made, the appropriate remedy is not dismissal, but a stay of the proceedings so that conciliation between the parties may take place" and going on to examine the conciliation process). Specifically, this Court expressed its opinion that the EEOC's conciliation process is subject to review. *EEOC v. Crownline Boats, Inc.*, 04–cv–4244–JPG, 2005 WL 1618809, at *2–4 (S.D.Ill. July 5, 2005) ("Even though conciliation is not a jurisdictional prerequisite, the defendant may still attack the sufficiency of the EEOC's conciliation as an affirmative defense to the EEOC's claim.").

In *Caterpillar*, the Seventh Circuit held that the existence of probable cause is not a justiciable issue in a suit brought by the EEOC. *EEOC v. Caterpillar*, 409 F.3d 831, 833 (7th Cir. 2005). Specifically, the EEOC's notice to Caterpillar stated it had "reasonable cause to believe that Caterpillar discriminated against [the claimant] and a class of female employees." *Id.* at 831–32. The EEOC's suit alleged that Caterpillar had engaged in plant-wide discrimination. Caterpillar argued that the plant-wide allegation was unrelated to the original charge and moved for summary judgment. *Id.* at 832. The

court denied the motion but certified the following question for interlocutory appeal:

> In determining whether the claims in an EEOC complaint are within the scope of the discrimination allegedly discovered during the EEOC's investigation, must the court accept the EEOC's Administrative Determination concerning the alleged discrimination discovered during its investigation, or instead, may the court itself review the scope of the investigation?

Id. The Seventh Circuit answered that question in the negative, specifically stating as follows:

> If courts may not limit a suit by the EEOC to claims made in the administrative charge, they likewise have no business limiting the suit to claims that the court finds to be supported by the evidence obtained in the Commission's investigation. The existence of probable cause to sue is generally and in this instance not judicially reviewable.

Id. at 833.

Here, the EEOC fails to argue that its conciliation efforts would satisfy either the "deferential standard" or the "heightened scrutiny standard." Rather, the EEOC argues that the *Caterpillar* decision compels this Court to conclude that its conciliation process is not subject to any level of judicial review because conciliation, like a probable

cause determination, is a prerequisite to filing suit.[1] *See* 42 U.S.C. § 2000e-f(b). Considering the same argument from the EEOC, a court in the Northern District of Illinois concluded that *Caterpillar* compels no such conclusion.[2] *EEOC v. St. Alexius Med. Ctr.*, No. 12–cv–7646, 2012 WL 6590625, at *2 (N.D.Ill.Dec.18, 2012). The *St. Alexius* court reasoned that *Caterpillar* only found the probable cause determination not subject to judicial review and did not address the conciliation process. *Id.* That court further reasoned it

> would not read *Caterpillar* as having implicitly disagreed with the consensus, adopted by all circuits to have addressed the

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[1] The Court also notes that the EEOC makes an argument that the Administrative Procedures Act ("APA") is relevant to the Court's decision. The EEOC cites no authority that directly supports this proposition. Further, this is an action brought directly by the EEOC, not a person aggrieved by an agency action. *See* 5 U.S.C. § 702 ("A person suffering legal wrong because of an agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entited to judicial review thereof .").

[2] While *St. Alexius* considered an American with Disabilities Act ("ADA") case, as that Court noted, the ADA incorporated the provisions of Title VII "regarding the procedures the EEOC must follow in handling administrative charges and in filing suits against employers on behalf of claimants." *St. Alexius*, 2012 WL 6590625, at *1 (citing 42 U.S.C. § 2177(a)).

> issue, that the EEOC's presuit conciliation efforts are subject to at least *some* level of judicial review; when the Seventh Circuit departs from such a consensus, it does so explicitly. *See Turley v. Gaetz*, 625 F.3d 1005, 1012 (7th Cir. 2010). Reading *Caterpillar* in the manner urged by the EEOC would be particularly unwise given that the Seventh Circuit has cited with approval *Keco Industries* and *Zia*, two of the decisions recognizing a court's authority to evaluate the EEOC's conciliation efforts when those efforts (or lack thereof) are challenged by a defendant in an EEOC-initiated employment discrimination suit. *See [EEOC v.] Elgin Teachers Ass'n*, 27 F.3d [292,] 294 [(7th Cir. 1994)].

Id. at *2. The Court finds the *St. Alexius* reasoning persuasive and adopts its reasoning herein.

The Court also notes that at least one other circuit rejects the EEOC's reasoning that *Caterpillar*'s holding, that the pre-suit reasonable cause determination is non justiciable, is inconsistent with a holding that the conciliation process is justiciable. The Fourth Circuit, like *Caterpillar*, has held that Title VII does not provide for review of the EEOC's reasonable cause determination. *Caterpillar*, 409 F.3d at 832 (citing *Georator Corp. v. EEOC*, 592 F.2d 765, 767 (4th Cir. 1979)). That same circuit also employs a deferential standard in reviewing the EEOC's conciliation process. *See EEOC v. Radiator Specialty Co.*, 610 F.2d 178, 183 (4th Cir. 1979) (finding "the law ... requires no more than a good faith attempt at conciliation" and determining that

the EEOC had provided such a good faith attempt after examining the attempts at conciliation).

For these reasons, the Court concludes that *Caterpillar* does not preclude at least some level of judicial review of the EEOC's conciliation process. Thus, the Court denies the EEOC's motion for summary judgment. Of course, this ruling does not preclude the EEOC from filing a motion for summary judgment arguing that it did conciliate in good faith.

Finally, the EEOC filed a motion to strike a section of Mach Mining's response to the EEOC's motion for summary judgment that contained references to the conciliation process. The EEOC argues Mach Mining's reference to the conciliation process violates the portion of 42 U.S.C. § 2000e–5(b) that states "[n]othing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned." However, because the Court has found that the EEOC's conciliation process is subject to at least some level of review and that review would involve at least a cursory review of the parties' conciliation, the Court denies the EEOC's motion.

The Court notes, however, that the inquiry into the conciliation process does not require every detail of the conciliation process, as the Court need only determine whether the EEOC made "a sincere and reasonable effort to negotiate." *EEOC v. Menard, Inc.*, 08–cv–0655–DRH, 2009 WL 1708628, at *1 (S.D.Ill. June 17, 2009); *see EEOC v. Zia Co.*, 582 F.2d 527, 533 (10th Cir. 1978) ("a court should not examine the details of the offers and counteroffers

between the parties, nor impose its notions of what the agreement should provide"); *see also EEOC v. Hibbing Taconite Co.*, 266 F.R.D. 260, 273 (D.Minn.2009) ("While the substance and details of any settlement offers, or discussions, are not discoverable, the actions and efforts, that are undertaken by the EEOC to conciliate the matter are discoverable information, and are subject to the Court's review.)

3. Conclusion

Thus, the Court finds that the EEOC is not entitled to judgment as a matter of law on Mach Mining's affirmative defense that the EEOC failed to conciliate in good faith and **DENIES** the EEOC's motion for summary judgment (Doc. 32). The Court further **DENIES** the EEOC's motion to strike Section F of Mach Mining's response (Doc. 45).

IT IS SO ORDERED.

DATED: January 28, 2013

s/ J. Phil Gilbert
J. PHIL GILBERT
DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	
	)	
Plaintiff,	)	
	)	Case No. 11-
vs.	)	cv-879-JPG-
	)	PMF
MACH MINING, LLC,	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER

This matter comes before the Court on plaintiff Equal Employment Opportunity Commission's ("the EEOC") motion (Doc. 59) to reconsider or to certify for appeal pursuant to 28 U.S.C. § 1292(b) this Court's order (Doc. 55) denying the EEOC's motion for partial summary judgment. Defendant Mach Mining, LLC ("Mach Mining") filed a response (Doc. 66) to which the EEOC replied (Doc. 72). The Court heard oral argument on this matter on May 16, 2013. For the following reasons, the Court denies the motion to reconsider and grants the motion to certify this Court's January 28, 2013, order (Doc. 55) for appeal.

1. Facts

The EEOC filed the instant suit on behalf of Brooke Petkas and a class of female applicants who

had applied for non-office jobs at Mach Mining. According to the EEOC, Mach Mining "has never hired a single female for a mining-related position," and "did not even have a women's bathroom on its mining premises." Doc. 32, p. 1–2. The complaint alleges that Mach Mining's Johnston City, Illinois, facility engaged in a pattern or practice of unlawful employment practices since at least January 1, 2006. Specifically, those unlawful "practices included, but are not limited to failing or refusing to hire females into mining and related (nonoffice) positions because of their sex." Doc. 2, p. 2. The EEOC further alleges that Mach Mining "has utilized hiring practices that cause a disparate impact on the basis of sex" through its practice of "hiring only applicants who are referred by current employees." Doc. 2, p. 3.

In its answer, Mach Mining asserted the affirmative defense that the EEOC failed to conciliate in good faith. The EEOC then filed a motion for partial summary judgment arguing that conciliation is beyond the scope of judicial review. This Court denied the EEOC's motion finding that the EEOC's conciliation efforts were subject to at least *some* level of review (Doc. 55). The EEOC now asks the Court to reconsider its order denying the EEOC's motion for partial summary judgment. In the alternative, the EEOC asks this Court to certify the following question for interlocutory appeal pursuant to 28 U.S.C. § 1292(b): "whether, under Title VII or the [Administrative Procedure Act] ("APA"), courts may review EEOC's informal efforts to secure a conciliation agreement acceptable to the Commission before filing suit."

2. Motion to Reconsider

The EEOC argues reconsideration is appropriate because the Court committed manifest errors of law when it failed to (1) construe the APA to preclude judicial review of conciliation; and (2) strike Mach Mining's brief that referred to conciliation. "A court has the power to revisit prior decisions of its own ... in any circumstance, although as a rule courts should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice.'" *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988) (quoting *Arizona v. California*, 460 U.S. 605, 618 n. 8 (1983)); Fed.R.Civ.P. 54(b) (providing a non-final order "may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities"). The decision whether to reconsider a previous ruling in the same case is governed by the law of the case doctrine. *Santamarina v. Sears, Roebuck & Co.*, 466 F.3d 570, 571–72 (7th Cir. 2006). The law of the case is a discretionary doctrine that creates a presumption against reopening matters already decided in the same litigation and authorizes reconsideration only for a compelling reason such as a manifest error or a change in the law that reveals the prior ruling was erroneous. *United States v. Harris*, 531 F.3d 507, 513 (7th Cir. 2008); *Minch v. City of Chicago*, 486 F.3d 294, 301 (7th Cir. 2007). The Court will now consider whether it committed a manifest error of law requiring the reversal of its order denying the EEOC's motion for partial summary judgment.

a. APA Applicability

In a footnote in its order denying the EEOC's motion for partial summary judgment, the Court noted the EEOC did not provide caselaw supporting its argument that the APA precludes judicial review of its statutory conciliation requirement. The EEOC, in its motion to reconsider, now backs up its argument with caselaw referencing the APA. Specifically, the EEOC cites to *Standard Oil*, *AT & T*, *Caterpillar*, and *Elgin*. In *Standard Oil*, the Supreme Court found that the Federal Trade Commission's issuance of a complaint, including its reasons to believe the defendant was in violation of the Federal Trade Commission Act, was not judicially reviewable. *FTC v. Standard Oil Co. of California*, 449 U.S. 232, 243 (1980). In *AT & T*, the D.C. Circuit held that the EEOC's letters of determination did not constitute final agency action that was reviewable by the court. *AT & T Co. v. EEOC*, 270 F.3d 973, 976–77 (D.C.Cir. 2001). In *Caterpillar*, a case on which the EEOC heavily relies, the Seventh Circuit held that "[t]he existence of probable cause to sue is generally and in this instance not judicially reviewable." *EEOC v. Caterpillar, Inc.*, 409 F.3d 831, 833 (7th Cir. 2005). In sum, *Standard Oil*, *AT & T*, and *Caterpillar* do not take a position on conciliation, and do not persuade the Court that conciliation is beyond judicial review.

In *Elgin Teachers Association*, the only case cited by the EEOC that considers conciliation, the EEOC found the Elgin school district's collective bargaining agreement objectionable. *EEOC v. Elgin Teachers Ass'n*, 27 F.3d 292, 293 (7th Cir. 1994). Even though the school district changed the objectionable portions of the agreement, the EEOC filed suit seeking

damages. *Id.* The Seventh Circuit rejected the defendant's argument that the EEOC lacked the right to bring suit. *Id.* at 294. Specifically, "[a]lthough the EEOC must pursue conciliation, 42 U.S.C. § 2000e–5(b); *EEOC v. Zia Co.*, 582 F.2d 527 (10th Cir. 1978), it failed to get all of what it wanted in bargaining." *Id.* Accordingly, rather than find conciliation was unreviewable, the Seventh Circuit merely found that the EEOC could pursue its suit because it did not receive all of what it bargained for in conciliation. *Id.*

Interestingly, *Elgin Teachers Association* provides support for a court's authority to inquire into the EEOC's conciliation process. First, the opinion specifically says the EEOC *must* pursue conciliation. *Id.* at 294. Without court review this statutory command is meaningless. Further, the Seventh Circuit cites to *Zia* with approval. *Id.* In *Zia*, the Tenth Circuit specifically recognized a court's authority to review conciliation when it held that "the EEOC is required to act in good faith in its conciliation efforts." *EEOC v. Zia Co.*, 582 F.2d 527, 533 (10th Cir. 1978). However, "a court should not examine the details of the offers and counteroffers between the parties, nor impose its notions of what the agreement should provide...." *Id.* Accordingly, the Seventh Circuit's cite of approval to *Zia* in the context of conciliation leads this Court to believe the Seventh Circuit may find the EEOC's conciliation efforts are subject to at least a minimal level of review.

The EEOC has failed to provide any caselaw that supports its extension of the APA to preclude judicial review of conciliation. To the contrary, the Court's

ruling was consistent with every Circuit to have considered the issue. *See, e.g., EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1259 (11th Cir. 2003) ("the EEOC must (1) outline to the employer the reasonable cause for its belief that Title VII has been violated; (2) offer an opportunity for voluntary compliance; and (3) respond in a reasonable and flexible manner to the reasonable attitudes of the employer"); *EEOC v. Keco Indus., Inc.*, 748 F.2d 1097, 1102 (6th Cir. 1984) (the district court should only determine whether the EEOC made an attempt at conciliation); *EEOC v. Radiator Specialty Co.*, 610 F.2d 178, 183 (4th Cir. 1979) (finding "the law ... requires no more than a good faith attempt at conciliation" and determining that the EEOC had provided such a good faith attempt after examining the various conciliation attempts); *EEOC v. Zia Co.*, 582 F.2d 527, 533 (10th Cir. 1978) ("a court should not examine the details of the offers and counteroffers between the parties, nor impose its notions of what the agreement should provide").

Further, the Court's order was consistent with Seventh Circuit caselaw that suggests courts may make at least some level of inquiry into conciliation. In *EEOC v. Massey–Ferguson*, the Seventh Circuit found that the EEOC was not required to raise class backpay claims during conciliation. 622 F.2d 271, 277 (7th Cir. 1980). However, the court stated that "failure to conciliate on class backpay is relevant to the question of unreasonable delay and, therefore, ultimately to laches." *Id.* Accordingly, the Seventh Circuit acknowledged that courts may inquire into the conciliation process. Similarly, in *Schnellbaecher v. Baskin Clothing*, the Seventh Circuit found

dismissal of a suit was appropriate where a party did not have notice of the charges or a chance to conciliate. 887 F.2d 124, 127 (7th Cir. 1989). Again, the Seventh Circuit seems to acknowledge that at least some level of inquiry into the conciliation process is appropriate. Thus, for the foregoing reasons, the Court cannot conclude it committed a manifest error of law in finding the EEOC's conciliation process is subject to at least some level of review.

b. Section F of Mach Mining's Response

Similarly, the Court cannot conclude it committed a manifest error of law in failing to strike Section F of Mach Mining's response to the EEOC's motion for partial summary judgment in which Mach Mining discusses the conciliation between the parties. The statute which the EEOC contends prohibits disclosure of this conciliation material provides as follows:

> Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned.

42 U.S.C. § 2000e–5(b). The EEOC argues that the Court erred because its ruling was in contradiction to the portion of the statute prohibiting conciliation matters to be "used as evidence in a subsequent proceeding without the written consent of the persons concerned." *Id.*

This statutory command to refrain from introducing conciliation matters into evidence in

subsequent proceedings appears to be in contradiction to the EEOC's statutory duty to conciliate. The statute requiring conciliation provides that

> [i]f the [EEOC] determines [ ] that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.

42 U.S.C. § 2000e-f(b). As previously discussed, this statute has been read by every court to have considered the issue as requiring the EEOC to conciliate and subjecting that conciliation to at least some level of judicial review. However, to review whether the EEOC engaged in conciliation, at least some level of evidence regarding conciliation efforts must be introduced into evidence in a proceeding before the court.

"Statutory terms or words will be construed according to their ordinary, common meaning." *Precision Indus., Inc. v. Qualitech Steel SBQ, LLC*, 327 F.3d 537, 544 (7th Cir. 2003). "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what is says there." *Id.* (citing *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992)). The Court must also be mindful that statutes dealing with the same subject matter must "be read *in pari materia* and harmonized when possible." *Matter of Johnson*, 787 F.2d 1179, 1181 (7th Cir. 1986). Courts have an obligation to construe statutes "in such a way as to avoid conflicts between them, if such a construction is possible and reasonable." *Precision Indus., Inc.*, 327 F.3d at 544.

The Court believes a reasonable interpretation of 42 U.S.C. § 2000e–5(b) is achieved by construing that statute as prohibiting the introduction of conciliation matters into evidence to prove or disprove a claim on the merits. That statute, however, does not prohibit the introduction of conciliation matters in collateral proceedings such as contesting the EEOC's conciliation efforts. The Court can harmonize 42 U.S.C. § 2000e-f(b) with 42 U.S.C. § 2000e–5(b) in this manner by comparing 42 U.S.C. § 2000e–5(b) to Federal Rule of Evidence 408.

Rule 408 prohibits any party from introducing evidence of settlement negotiations into evidence. Fed.R.Evid. 408(a). However, "[t]he court may admit this evidence" in a collateral proceeding. Fed.R.Evid. 408(b). The prohibition on the introduction of the EEOC's conciliation efforts is similar to the reasoning behind Rule 408. Evidence of compromise is excluded on the ground of "the public policy favoring the compromise and settlement of disputes." Fed.R.Evid. 408 advisory committee's note. Similarly, "[w]hen Congress first enacted Title VII in 1964 it selected '[c]ooperation and voluntary compliance as the preferred means for achieving' the goal of equality of employment opportunities." *Occidental Life Ins. Co. of California v. EEOC*, 432 U.S. 355, 367–68 (1977). Congress intended the EEOC not "simply as a vehicle for conducting litigation on behalf of private parties," but as an "agency charged with the responsibility of investigating claims of employment discrimination and settling disputes, if possible, in an informal, noncoercive fashion." *Id.* at 368.

Because both Rule 408 and the EEOC's duty to conciliate arise from a strong policy favoring

settlement, it is reasonable for the Court to read 42 U.S.C. § 2000e-f(b) as prohibiting the introduction of conciliation with respect to a ruling on the merits of the case. However, such evidence may be permitted in a collateral matter, such as assessing whether the EEOC has engaged in conciliation. Such a construction would further the policy encouraging settlement, but at the same time allow courts to review conciliation in a collateral proceeding. This reading is reasonable and avoids a contradiction of the statutes requiring conciliation and prohibiting the introduction of conciliation matters into evidence. It further avoids an absurd result which would be present if a party contesting conciliation could not introduce evidence of that conciliation. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available").

In this instance, Mach Mining did not introduce conciliation matters for the purpose of proving or disproving this case on its merits. Rather, Mach Mining attached this information for the purpose of proving the EEOC failed to fulfill its statutory obligation to conciliate. For that reason, the Court did not commit a manifest error of law in failing to strike Section F of Mach Mining's response to the EEOC's motion for partial summary judgment.

For the foregoing reasons, the Court did not commit a manifest error of law in failing to read the APA as prohibiting judicial review of conciliation or in declining to strike Section F of Mach Mining's response to the EEOC's motion for partial summary

judgment. Thus, the Court denies the EEOC's motion to reconsider.

3. Motion to Certify

In the alternative, the EEOC asks this Court to certify its order denying the EEOC's motion for partial summary judgment to the Seventh Circuit Court of Appeals pursuant to section 1292(b). The court of appeals, in its discretion, may hear an interlocutory appeal after certification from the district court that the appeal presents "a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). Accordingly, "[t]here are four statutory criteria for the grant of a section 1292(b) petition to guide the district court: there must be a question of *law*, it must be *controlling*, it must be *contestable*, and its resolution must promise to *speed up* the litigation." *Ahrenholz v. Bd. of Trs. of Univ. of Ill.*, 219 F.3d 674, 676 (7th Cir. 2000). The party seeking an interlocutory appeal bears the burden of demonstrating "exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978).

There are two questions at issue as follows: (1) Is the EEOC's conciliation process subject to judicial review?; and (2) If so, is that level of review a deferential or heightened scrutiny level of review? There is no doubt that these questions are questions of law. Further, the EEOC's position has merit. EEOC has pointed out that no circuit has considered

its APA arguments. Also, while all circuits to have considered the issue have found conciliation subject to review, those circuits are not in agreement on the level of review. *See United Rd. Towing, Inc.*, 2012 WL 1830099, at *4 (citing *EEOC v. McGee Bros.*, No. 10–cv–142, 2011 WL 1542148, at *4 (W.D.N.C. Apr. 21, 2011)) (noting some circuits employee a "deferential standard" and others use a "heightened scrutiny standard" of conciliation review). The Seventh Circuit has not specifically ruled on the justiciability of conciliation or the extent of that inquiry. The EEOC also advances significant arguments that *Caterpillar* should be extended to prohibit judicial review of conciliation.

The questions raised are controlling in this case. "A question of law may be deemed 'controlling' if its resolution is quite likely to affect the further course of the litigation, even if not certain to do so." *Sokaogon Gaming Enter. Corp. v. Tushie–Montgomery Assocs., Inc.*, 86 F.3d 656, 659 (7th Cir. 1996). Here, if conciliation is justiciable, the inquiry into the EEOC's conciliation could dramatically impact the size of the class. *See EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657, 689–90 (8th Cir. 2012) (dismissing EEOC's claims on behalf of claimants whose alleged harassment occurred after the filing of suit because EEOC could not have conciliated on those claimants' behalf).

Finally, an interlocutory appeal on this matter may also advance the ultimate termination of litigation. If this appeal is not allowed, and Mach

Mining is allowed to discover conciliation material to support its affirmative defense, the numerous discovery requests[1] from Mach Mining will undoubtedly delay the termination of this litigation. On the other hand, if the Seventh Circuit concludes that the EEOC's conciliation process is not justiciable, this case will proceed exponentially faster absent numerous conciliation-related discovery requests.

Because the EEOC has established the four statutory criteria for certification pursuant to § 1292(b), the Court grants the EEOC's motion to

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[1] The EEOC summarized the relevant pending discovery as follows:

> Mach [Mining]'s motion to compel discovery on this topic is currently pending and the discovery sought is extensive, including over 100 requests to admit facts, interrogatories, and a 30(b)(6) deposition of an EEOC official. Invariably there is overlap between material that concerns conciliation and material that is covered by the deliberative process privilege. Depositions on these topics almost always produce further discovery disputes regarding EEOC's invocation of this privilege. Mach [Mining] has also indicated that it seeks to depose all of the female applicants for whom EEOC seeks relief, and given the nature of its inquiries to date, it is reasonable to assume that it will attempt to question each woman about her participation in conciliation.

Doc. 72, p. 2.

certify and certifies the following questions for appeal: Whether courts may review the EEOC's informal efforts to secure a conciliation agreement acceptable to the EEOC before filing suit? If courts may review the EEOC's conciliation efforts, should the reviewing court apply a deferential or heightened scrutiny standard of review?

4. Conclusion

In conclusion the Court **GRANTS in part and DENIES in part** the EEOC's motion (Doc. 59). Specifically, the Court **DENIES** the EEOC's motion to reconsider and **GRANTS** its motion to certify this Court's January 28, 2013, order for interlocutory appeal. The Court **CERTIFIES** its January 28, 2013, order (Doc. 55) for interlocutory appeal because the following questions meet the 28 U.S .C. § 1292(b) requirements:

> May courts review the EEOC's informal efforts to secure a conciliation agreement acceptable to the EEOC before filing suit? If courts may review the EEOC's conciliation efforts, should the reviewing court apply a deferential or heightened scrutiny standard of review?

IT IS SO ORDERED.
DATED: May 20, 2013

s/ J. Phil Gilbert
J. PHIL GILBERT
DISTRICT JUDGE

REPLY BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
JUN 2 - 2014
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 13-1019

IN THE

Supreme Court of the United States

MACH MINING, LLC,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

REPLY BRIEF FOR PETITIONER 1

CONCLUSION 6

APPENDIX 1a

TABLE OF AUTHORITIES

Cases

EEOC v. The Geo Grp., Inc.,
No. 13-16292 (9th Cir.) 1

REPLY BRIEF FOR PETITIONER

The parties agree that the petition in this case should be granted. The Solicitor General acknowledges that the petition "presents a recurring question of substantial importance on which the courts of appeals have disagreed." U.S. Br. 7. He rightly concludes that this "Court's review of the question presented therefore is warranted." *Id.* 7. And the Government emphasizes the need to resolve the circuit conflict now, stating that the division "has placed the Commission in an untenable position." *Id.* 17.[1]

1. The Government does argue that the court of appeals' decision is correct, but that is no basis for denying certiorari. As the Government emphasizes, the current disarray in the circuits is intolerable in itself. *Id.* This Court will resolve that conflict and

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[1] For that reason, the Government does not suggest the Court await the results of the pending litigation in the Ninth Circuit. *See* U.S. Br. 16 n.9 (citing *EEOC v. The Geo Grp., Inc.*, No. 13-16292 (9th Cir.)). There is little prospect the Ninth Circuit's decision will add appreciably to the debate – the Government has simply reiterated in that forum the same arguments it made below in this case and in its brief to this Court. *See* Brief of Plaintiff-Appellant Equal Employment Opportunity Commission § I, at 23-50, *EEOC v. Geo Grp., Inc.*, No. 13-16292 (9th Cir. Mar. 7, 2014). Moreover, the Ninth Circuit may not even reach the question, as the defendants have disavowed any argument that the case should be dismissed for failure to conciliate. *See* Appellee's Brief § VI.F.1, at 38-43, *EEOC v. Geo Grp., Inc.*, No. 13-16292 (9th Cir. May 2, 2014) (entitled "The Separate 'Failure To Conciliate In Good Faith' Issue Is Irrelevant And Moot").

restore the uniformity Congress intended whether it reverses or affirms.

Moreover, even if doubt about the correctness of the decision below were a relevant consideration, petitioner has provided ample reason to believe the decision below is wrong. The Government largely ignores those arguments, content to simply recite the court of appeals' rationale, which is not made any more convincing through repetition. For example, the Government repeats the Seventh Circuit's observation that Title VII does not expressly make non-compliance with the conciliation mandate a defense. U.S. Br. 7. But it does not deny (or even acknowledge) petitioner's showing that this Court has repeatedly held that noncompliance with other preconditions to suit, including other Title VII preconditions, is a basis for dismissal, even when Congress did not expressly provide for such a defense. *See* Pet. 23-25.

The Government also ignores the petition's showing that the statute's confidentiality provisions, read in historical context and in light of their purposes, preclude only use of conciliation evidence to prove or disprove the merits of a discrimination claim, as the EEOC itself has previously argued. *See* Pet. 26-28.

Likewise, the Solicitor General reiterates the Seventh Circuit's assertion that courts have failed to develop a "workable standard for reviewing" the EEOC's conciliation efforts. U.S. Br. 10. That claim is unsupported. *See* Pet. 29-31. And in any event, the Solicitor General offers no response to petitioner's point that even if the courts' standards were unsatisfactory, the Commission itself has authority

to issue regulations to give greater clarity and content to the conciliation obligation, as it has done with respect to other procedural prerequisites to litigation under Title VII. Pet. 31-33.

2. Instead of engaging with petitioner's legal arguments, the Government tries to portray petitioner as uninterested in conciliation and bent instead on using the conciliation process "to develop an affirmative defense for litigation" and to delay adjudication of the merits of the Commission's allegations. U.S. Br. 18; *see also id.* 4. The Government states, for example, that "petitioner spent two years seeking extensive discovery about the Commission's investigation and conciliation efforts," submitting more than 600 requests for admission on the topic. *Id.* 18. The Solicitor General further alleges that petitioner "objected to merits-based discovery based on the Commission's 'asserted failure to conciliate.'" *Id.* (citations omitted). These claims are seriously misleading.

In fact, petitioner submitted only *sixteen* entirely reasonable requests for admission relating to the Commission's failure to conduct any investigation, or provide petitioner any information, regarding the damages sought on behalf of individual claimants;[2] the Commission apparently arrives at its 600-plus number by multiplying each request for admission by 44 claimants. At the same time, the Commission fails to acknowledge that it could answer many of the

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[2] The text of the requests is set forth in the appendix to this brief.

questions with a simple "yes" or "no" that would apply to all the claimants. *See* R. 26 (EEOC's four-page chart collecting responses for all claimants).[3]

Likewise, discovery took two years not because of its volume or petitioner's belligerence,[4] but rather because the Commission's insistence that its conciliation obligations were unenforceable led it to file repeated motions resisting discovery and challenging petitioner's conciliation defense. *See, e.g.*, R. 32, 34; R. 59, 72; R. 60; R. 62; R. 73, R. 80. And although the Solicitor General says that petitioner "objected to merits-based discovery" on the ground that the Commission failed to conciliate, U.S. Br. 18, he fails to disclose that petitioner dropped that objection and responded to the Commission's discovery requests.

3. The Government's misleading characterization of the discovery process in this case is consistent with its misunderstanding of the incentives faced by employers charged with engaging in unlawful discrimination. As amici have explained, employers have substantial incentives to settle even arguably meritorious discrimination claims informally. *See* Brief of *Amici Curiae* Retail Litigation Center, Inc., et al. § I.B. The Government's claim that "the stronger the EEOC's

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[3] "R. xx" refers to the docket entry in the district court record.

[4] The requests for admission, for example, were designed to *streamline* discovery by eliminating the need for interrogatories or depositions concerning matters that petitioners suspected would be uncontested.

case on the merits, the stronger the incentive to use a failure-to-conciliate defense," U.S. Br. 11-12 (internal quotation marks and citation omitted), has it exactly backwards – the stronger the EEOC's case, the *greater* incentive the employer has to reach an agreement to avoid the prospect of embarrassing litigation and a reputation-damaging verdict. But given their fiduciary duties to their stockholders, company managers cannot responsibly settle claims (sometimes for millions of dollars) in the absence of *some* reasonable basis for believing that there is a legal and factual basis for the suit and the amount of damages demanded by the Government. And experience has shown that the Commission attorneys are sometimes inclined to make demands first, then develop the legal and factual basis for those demands later, after having filed suit. *See* Retail Litigation Center Br., *supra*, § I.A. Other times, the EEOC may be tempted to short-change conciliation in the hopes of establishing particular legal principles through litigation. Whatever the reason, failure to engaging in meaningful conciliation predictably delays relief to injured employees with meritorious claims and imposes litigation costs on employers that often could be avoided through the good faith conciliation Congress has commanded.

Accordingly, the fact that employers have sometimes been forced to "challenge[] the adequacy of the Commission's conciliation efforts," U.S. Br. 18, and that courts have regularly found those efforts grossly inadequate, *see* Retail Litigation Center Br., *supra*, § I.A., only illustrates the need for judicial enforcement of the conciliation precondition and

reinforces the need for this Court to overturn the Seventh Circuit's erroneous decision in this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 2, 2014

APPENDIX

APPENDIX

Petitioner submitted materially identical requests for admissions for each claimant, as follows:

1. Admit that at no time after June 1, 2007, [Claimant] applied for a job with Mach.
2. Admit that as of September 17, 2010, EEOC had not determined that the "class of female applicants" (as referenced in the Letter of Determination) specifically included [Claimant].
3. Admit that as of September 17, 2010, EEOC had not verbally communicated with [Claimant].
4. Admit that as of September 17, 2010, EEOC had not exchanged written correspondence, including emails, faxes and/or any letters, with [Claimant].
5. Admit that as of September 17, 2010, EEOC had not requested any documents from a third party identified by [Claimant].
6. Admit that as of September 17, 2010, EEOC had not subpoenaed any documents from a third party identified by [Claimant].
7. Admit that as of September 17, 2010, EEOC had not interviewed any witnesses identified by [Claimant].
8. Admit that as of September 17, 2010, EEOC had not investigated whether Mach had specifically discriminated against [Claimant] based on her gender.

9. Admit that as of September 27, 2011, EEOC had not estimated damages in the form of back wages for [Claimant].

10. Admit that as of September 27, 2011, EEOC had not disclosed [Claimant]'s estimated back wages to Mach.

11. Admit that as of September 27, 2011, EEOC had not estimated damages in the form of front wages for [Claimant].

12. Admit that as of September 27, 2011, EEOC had not disclosed [Claimant]'s estimated front wages to Mach.

13. Admit that as of September 27, 2011, EEOC had not estimated damages in the form of lost benefits for [Claimant].

14. Admit that as of September 27, 2011, EEOC had not disclosed [Claimant]'s estimated lost benefits to Mach.

15. Admit that as of September 27, 2011, EEOC had not performed any damages calculation on behalf of [Claimant].

16. Admit that as of September 27, 2011, EEOC had not disclosed [Claimant]'s damages calculation to Mach.

See EEOC's Responses To Defendant Mach Mining, LLC's First Request For Admission Directed to Plaintiff, R. 26.

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

FILED
MAR 27 2014
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No. 13-1019

IN THE

Supreme Court of the United States

MACH MINING, LLC,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF *AMICI CURIAE* RETAIL LITIGATION CENTER, INC., CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. THE DECISION BELOW WILL HINDER THE VOLUNTARY RESOLUTION OF TITLE VII DISPUTES 3

A. Experience Illustrates That the EEOC Too Often Bypasses Its Duty To Engage in Meaningful Pre-Suit Conciliation 5

B. Employers Would Have No Reason To Refuse Reasonable Conciliation Offers in Favor of Holding Out for Judicial Review 12

II. THE DECISION BELOW IS WRONG 16

A. The Seventh Circuit's Refusal To Enforce a Statutory Command Has No Legal Basis and Lacks a Limiting Principle 16

B. The Contemporaneous Legislative Record Refutes the Seventh Circuit's Decision 19

C. As Four Decades of Jurisprudence Shows, Courts Have No Trouble Applying Title VII's Conciliation Requirement 21

CONCLUSION 23

TABLE OF AUTHORITIES

Page(s)

CASES

Alexander v. Sandoval,
532 U.S. 275 (2001) 18

Burlington Indus., Inc. v. Ellerth,
524 U.S. 742 (1998) 3

Chandler v. Roudebush,
425 U.S. 840 (1976) 20

Doe v. Oberweis Dairy,
456 F.3d 704 (7th Cir. 2006) 22

EEOC v. Agro Distrib. LLC,
555 F.3d 462 (5th Cir. 2009) 7

EEOC v. Allegheny Airlines,
436 F. Supp. 1300 (W.D. Pa. 1977) 10, 11

EEOC v. Asplundh Tree Expert Co.,
340 F.3d 1256 (11th Cir. 2003) 3, 6, 22

EEOC v. Bass Pro Outdoor World, LLC,
No. 4:11-CV-3425, 2014 U.S. Dist. LEXIS
27019 (S.D. Tex. Mar. 4, 2014) 14

EEOC v. Bloomberg L.P.,
751 F. Supp. 2d 628 (S.D.N.Y. 2011) 13

EEOC v. Bloomberg L.P.,
No. 07-Civ.-8383, 2013 U.S. Dist. LEXIS
128385 (S.D.N.Y. Sept. 9, 2013)..... 8, 9

EEOC v. Container Corp. of Am.,
352 F. Supp. 262 (M.D. Fla. 1972)..... 22

EEOC v. CRST Van Expedited, Inc.,
679 F.3d 657 (8th Cir. 2012) 9, 22

TABLE OF AUTHORITIES
(continued)

Page(s)

EEOC v. Dillard's, Inc.,
No. 08–CV–1780, 2011 U.S. Dist. LEXIS 76206 (S.D. Cal. July 14, 2011) 11

EEOC v. Evans Fruit Co.,
872 F. Supp. 2d 1107 (E.D. Wash. 2012) 7, 8

EEOC v. Pet, Inc., Funsten Nut Div.,
612 F.2d 1001 (5th Cir. 1980) (per curiam) ...10, 22

EEOC v. Sears, Roebuck & Co.,
504 F. Supp. 241 (N.D. Ill. 1980) 20

EEOC v. Sears, Roebuck & Co.,
650 F.2d 14 (2d Cir. 1981) 9, 10, 14

EEOC v. Shell Oil Co.,
466 U.S. 54 (1984) 3, 17

Gonzaga Univ. v. Doe,
536 U.S. 273 (2002) 18

Hallstrom v. Tillamook Cnty.,
493 U.S. 20 (1989) 18

Hudson v. McMillian,
503 U.S. 1 (1992) 23

INS v. St. Cyr,
533 U.S. 289 (2001) 16

Jones v. Bock,
549 U.S. 199 (2007) 18

Occidental Life Ins. Co. v. EEOC,
432 U.S. 355 (1977) 4, 20

Reed Elsevier, Inc. v. Muchnick,
559 U.S. 154 (2010) 18

St. Paul Mercury Indem. Co. v. Red Cab Co.,
303 U.S. 283 (1938) 23

TABLE OF AUTHORITIES
(continued)

Page(s)

United States v. Felt & Tarrant Mfg. Co.,
283 U.S. 269 (1931) 18

United States v. Leon,
468 U.S. 897 (1984) 22

United States v. Zucca,
351 U.S. 91 (1956) 18

W.R. Grace & Co. v. Local Union 759,
461 U.S. 757 (1983) 3

CONSTITUTIONAL AND STATUTORY AUTHORITIES

U.S. Const. art. I, §7 19

U.S. Const. art. I, § 8 19

U.S. Const. art. II, § 2 19

29 U.S.C. § 158(d) 23

42 U.S.C. § 1981a(b) 9

42 U.S.C. § 2000e-5(b) 13, 17

42 U.S.C. § 2000e-5(f) 14, 17, 18, 20

42 U.S.C. § 2000e-8 8

42 U.S.C. § 2000e-9 8

OTHER AUTHORITIES

117 Cong. Rec. 38402 (Nov. 1, 1971) 21

117 Cong. Rec. 40290 (Nov. 10, 1971) 21

118 Cong. Rec. 1976 (Feb. 1, 1972) 21

118 Cong. Rec. 3804 (Feb. 14, 1972) 20

EEOC Newsroom,
http://www.eeoc.gov/eeoc/newsroom/index 12

EEOC Strategic Enforcement Plan (Dec. 2012) 11

TABLE OF AUTHORITIES
(continued)

Page(s)

Sup. Ct. R. 37.6 1

S. 2515, 92d Cong. (1971) 20

S. Rep. No. 92-415 (1971) 21

INTEREST OF THE *AMICI CURIAE*[1]

The Retail Litigation Center, Inc. (RLC) is a public policy organization that identifies and engages in legal proceedings affecting the retail industry. The RLC's members include many of the country's largest and most innovative retailers. The member entities whose interests the RLC represents employ millions of people throughout the United States, provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues, and to highlight the potential industry-wide consequences of significant pending cases.

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

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[1] Counsel of record received timely notice of the intention to file this brief, and all parties have consented to the filing of this brief. As required by Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no person other than *amici*, their members, and their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

The National Federation of Independent Business (NFIB) Small Business Legal Center is a nonprofit, public-interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts. NFIB is the nation's leading small-business association; its mission is to promote and protect the right of its members to own, operate and grow their businesses. NFIB represents 350,000 businesses nationwide.

SUMMARY OF ARGUMENT

Petitioner has amply demonstrated the split among the Circuits over the question presented, and illustrated its recurring nature. *Amici* focus on why the decision below is troubling as a policy matter, and why it is wrong as a legal matter.

I. The Seventh Circuit found that eliminating judicial review of the conciliation duty would actually *promote* conciliation. The opposite is true, however. Title VII's enforcement history illustrates that the EEOC too often bypasses meaningful conciliation, preferring to sue first and negotiate later. But Congress understood that the best chance to settle a dispute is *before* litigation, and therefore directed the EEOC to conciliate *before* filing a suit. That is when employers are most eager to settle, to avoid the stigma of being labeled publicly as violators of civil rights. For that reason, also contrary to the decision below, no rational employer would invite that stigma by sandbagging conciliation in the marginal hope that a deferential judge will later grant relief. The court below thus misunderstood the real incentives facing the EEOC and employers. As a practical matter, refusal to enforce the conciliation obligation will mean *less* conciliation and more litigation.

II. The Seventh Circuit's decision is also legally unsupportable. *First*, it lacks any limiting principle, offering blind trust in an executive agency and relying on the faint hope of congressional oversight. Our legal system is not so sanguine. *Second*, the decision's conclusion is refuted by legislative history, as Congress *rejected* a bill that expressly made conciliation nonreviewable, in a compromise to skeptics of the EEOC who demanded more judicial oversight. To rewrite that bargain is plainly improper. *Third*, the court's insistence that no judicially manageable standard is possible ignores the forty-year body of jurisprudence that courts have developed in this area, and the numerous other contexts in which courts apply "good faith" inquiries. These tests may be fact-intensive, but that is no excuse for judicial abdication.

ARGUMENT

I. THE DECISION BELOW WILL HINDER THE VOLUNTARY RESOLUTION OF TITLE VII DISPUTES.

There is no dispute that "Congress intended cooperation and conciliation to be the preferred means of enforcing Title VII." *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 770-71 (1983); *see also Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764 (1998) (acknowledging "Congress's intention to promote conciliation rather than litigation in the Title VII context" (citing *EEOC v. Shell Oil Co.*, 466 U.S. 54, 77 (1984))). Indeed, it is no overstatement to say that "[t]he duty to conciliate is at the heart of Title VII." *EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1260 (11th Cir. 2003).

By stripping from federal courts the power to *enforce* that conciliation obligation, the decision below strikes at the heart of Title VII. Yet, somehow, the Seventh Circuit reasoned that eliminating judicial review would *promote* conciliation. That conclusion followed from two premises—one about the EEOC's incentives, the other about employers'—but the court below was wrong as to both.

First, the Seventh Circuit expressed confidence that the EEOC would still engage in meaningful conciliation, even without judicial review, given its own supposed "powerful incentives" to do so. (Pet. App. 20a-21a.) But history demonstrates that even *with* the check of judicial review, a zealous regulator—perhaps anxious to make new law, set an example, or garner a favorable headline—sometimes cuts corners from Title VII's "integrated, multistep enforcement procedure." *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 359, 368 (1977). The latter incentives will only intensify without the check of a neutral arbiter to encourage agency compliance.

Second, the Seventh Circuit worried that judicial review was encouraging employers to manipulate the conciliation process to manufacture a defense for the subsequent litigation. (Pet. App. 16a-18a.) That is implausible for a host of reasons. Employers want to *avoid* costly, drawn-out litigation and to *avoid* being accused of civil rights violations in publicly filed lawsuits. It is fanciful to think that they would incur with certainty the financial and reputational costs of an EEOC lawsuit in the hopes of subsequently manipulating the conciliation review process. Moreover, the standards applied by courts to enforce

the conciliation obligation are deferential to the EEOC, which means that an employer's odds of obtaining real relief through such manipulation are, at best, marginal.

Employers with operations within the Seventh Circuit are therefore concerned about the profoundly negative effect that the decision below will have on the voluntary resolution of employment disputes (harming employers *and* employees). As Congress well understood, the best time to settle such disputes is *before* they reach court, *before* they attract public scrutiny, *before* the parties become adversaries in federal litigation. All of that is lost if the EEOC can sue first and negotiate later—yet, unfortunately, that is the natural effect of the decision below. This case therefore deserves this Court's attention.

A. Experience Illustrates That the EEOC Too Often Bypasses Its Duty To Engage in Meaningful Pre-Suit Conciliation.

The Seventh Circuit was not bothered by the prospect of eliminating judicial enforcement of the EEOC's conceded obligation to attempt conciliation before filing suit, in part because it believed that the EEOC had sufficient incentives—even absent the threat of judicial review—to ensure its compliance. (Pet. App. 20a-21a.) The business community is far less confident based on years of experience. Forty years of jurisprudence illustrates how, despite its "limits of budget and personnel" and the prospect of congressional oversight (*see id.*), the EEOC has in many cases bypassed its statutory duty to engage in conciliation. This history undermines the court's counterintuitive, counter-factual assumption that eliminating review would promote conciliation, and

also illustrates the wide range of EEOC conduct that the decision below insulates from review. The Seventh Circuit overlooked this trail of numerous instances of the EEOC's actual failures to engage in meaningful conciliation and instead speculated about strategic behavior of employers. It is therefore worth a closer look at some illustrative cases.

Sometimes, the allure of filing a high-profile case overcomes a desire to settle privately. In *Asplundh Tree*, the EEOC in a "flurry of activity" gave the employer a "grossly arbitrary" deadline of "12 business days" to consider a conciliation offer requiring "both reinstatement and front pay" as well as "nationwide notice to its employees of [the] allegations" and the duty to conduct "nationwide anti-discrimination training of all its ... employees." 340 F.3d at 1258-59. This was after a *32-month* investigation with which the employer fully cooperated, and before the agency cited any theory of liability. *See id.* The employer's counsel attempted to contact the EEOC, but the agency "the next day" declared a failure of conciliation. *Id.* The Eleventh Circuit found that "[i]n its haste to file the instant lawsuit, with lurid, perhaps newsworthy, allegations, the EEOC failed to fulfill its statutory duty to act in good faith to achieve conciliation, effect voluntary compliance, and to reserve judicial action as a last resort." *Id.* at 1261. "The chronology of events," the court observed, "lend themselves to the interpretation that the Commission's haste may have been motivated, at least in part, by the fact that conciliation, *unlike litigation*, is not in the public domain." *Id.* at 1261 n.3.

In other cases, particular investigators may allow their own biases to interfere with their statutory duties. In *EEOC v. Agro Distribution LLC*, 555 F.3d 462 (5th Cir. 2009), "the Commission dealt in an arbitrary manner based on preconceived notions of its investigator and ignored the attempts of Agro's counsel to engage the Commission in settlement discussions." *Id.* at 468. Although the aggrieved employee "denied suffering any emotional problems from the [termination]," the EEOC demanded $120,000 for emotional suffering. *Id.* at 467 & n.5. The employer called the EEOC "requesting a meeting," but, "[t]he next day," the EEOC declared a failure of conciliation. *Id.* at 467. The employer then offered to pay a smaller sum, but the EEOC failed to respond for "[n]early ten months" and then flatly rejected the offer. *Id.* In the end, *after* filing suit, the EEOC offered to settle for less than 20% of the demand in its complaint, but the employer proceeded and prevailed on the merits at summary judgment. *See id.*

The EEOC sometimes is reluctant to provide the employer with the information necessary to evaluate the potential claims against it, perhaps because the agency is contemplating future litigation and does not want to give the employer any conceivable head start. Thus, for example, in *EEOC v. Evans Fruit Co.*, 872 F. Supp. 2d 1107 (E.D. Wash. 2012), the EEOC demanded $1 million for an unspecified class of female employees who had allegedly been sexually harassed. *See id.* at 1113-14. The employer asked the EEOC for the names of the employees who had supposedly conducted the harassment, and promised to "look further into the allegations of harassment and ... provide a status report ... within two weeks."

Id. "A mere six days later," however, the EEOC ended conciliation. *Id.* at 1114. The court faulted the EEOC for its failure "to be more forthcoming regarding the type of damages sought ..., some justification for the amount of damages sought, potential size of the class, general temporal scope of the allegations, and the potential number of individuals ... alleged to be involved in the harassment." *Id.* at 1115.

Other times, the EEOC's refusal to provide such information might stem from a preference for using the civil discovery process to identify and investigate allegations of discrimination and assemble a class of claimants, even though the EEOC is able to obtain information from the employer throughout the investigatory process, *see, e.g.*, 42 U.S.C. §§ 2000e-8, 2000e-9. For example, in *EEOC v. Bloomberg L.P.*, No. 07-Civ.-8383, 2013 U.S. Dist. LEXIS 128385 (S.D.N.Y. Sept. 9, 2013), the EEOC found that Bloomberg had discriminated against a "class" of pregnant women and demanded $7.5 million to compensate those class members. *Id.* at *9. But the EEOC did not *identify* any of these class members. Bloomberg requested information about these claimants (such as how many there were). *Id.* at *12. "The next day, the EEOC sent Bloomberg a letter declaring that conciliation has been unsuccessful ... " *Id.* Only after filing a federal suit and engaging in discovery did the EEOC identify particular employees on whose behalf it sought relief. *Id.* at *26-32. By proceeding in that fashion, the EEOC denied Bloomberg "an opportunity to tailor any class-wide conciliatory efforts to the breadth of legitimate

claims it might face." *Id.* at *27.[2] The court found that the EEOC had "blatantly contravene[d] Title VII's emphasis on resolving disputes without resort to litigation." *Id.* at *28-29.

Similarly, in *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657 (8th Cir. 2012), the EEOC issued a reasonable cause determination regarding a single named employee and an unidentified "class" of other employees allegedly subjected to sexual harassment. During conciliation, the EEOC insisted that the *employer* identify the class members; it did not do any investigation of its own to determine the size of the supposed "class" or the identity of its members. *See id.* at 667-68. Only after two years of discovery did the EEOC identify the employees who it alleged had been sexually harassed; and the "number of purported class members continuously changed throughout the discovery process." *Id.* at 676. As the district court and Eighth Circuit recognized, by suing first and identifying the scope of the liability later, the EEOC thus unfairly deprived the employer of a "meaningful opportunity to conciliate." *Id.*

Another difficulty faced by employers has been the tendency of some EEOC investigators to demand an "all-or-nothing" settlement. Thus, in *EEOC v. Sears, Roebuck & Co.*, 650 F.2d 14 (2d Cir. 1981), the EEOC brought suit alleging that the employer had engaged in race discrimination at two stores in New York. *Id.* at 16. Prior to filing the suit, however, the EEOC had offered to conciliate "only on a *nationwide*

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[2] The number of class members is a critical piece of information in evaluating any settlement, because damages are capped "for each complaining party." 42 U.S.C. § 1981a(b)(3).

basis, rather than with respect to the two facilities that were the subject of the suit." *Id.* (emphasis added). That was inadequate, the Second Circuit held, because the "framework chosen" for conciliation "must afford a fair opportunity to discuss the practices at those installations" that are "the subject of suit." *Id.* at 19. "Sears was given no opportunity to reform its practices in Brooklyn and White Plains ... prior to instigation of the suit." *Id.*

Conversely, in *EEOC v. Pet, Inc., Funsten Nut Division*, 612 F.2d 1001 (5th Cir. 1980) (per curiam), the employer expressed its willingness to conciliate the claims with respect to the alleged "class" but simply refused to reinstate or compensate one particular employee who had been terminated. *See id.* at 1002. The EEOC refused to settle *any* of the claims unless that individual was granted relief. *See id.* "Such an all-or-nothing approach on the part of a commission, one of whose most essential functions is to attempt conciliation, will not do." *Id.*

Finally, in some cases the EEOC conciliates on claims relating to a particular *type* of discrimination or a particular *geography* or a particular *employee* but, if that fails, substantially modifies the nature of the claims before filing suit and without notice to the employer. Perhaps because the EEOC erroneously assumes that it would have no more luck conciliating the new claims than the old ones, it does not attempt to reopen conciliation to address the new issues.

Thus, in *EEOC v. Allegheny Airlines*, 436 F Supp. 1300 (W.D. Pa. 1977), the EEOC tried to conciliate a claim that the airline was discriminating against men in hiring flight attendants. *See id.* at 1305. But when the parties were unable to reach

agreement on that claim of sex discrimination, the EEOC brought a suit that also asserted unrelated claims of *race* discrimination that the employer may well have been interested in settling, such as a claim of "excluding blacks from certain jobs because of their race" and "using pre-employment criteria (arrest record inquiries) which caused a disproportionate rejection of blacks." *Id.* at 1303.

And in *EEOC v. Dillard's, Inc.*, No. 08–CV–1780, 2011 U.S. Dist. LEXIS 76206 (S.D. Cal. July 14, 2011), the EEOC proposed to conciliate claims of two employees from a single store who were terminated for failure to provide sufficiently specific doctor notes after missing work. *See id.* at *2-5. The EEOC proposed that the employer pay damages of $325,000 to these employees, and did not mention damages for anyone else. *Id.* at *4-5. After the employer declined the offer, the EEOC filed suit on behalf of a class of "similarly-situated individuals" and then sought *nationwide* discovery to identify that class. *See id.* at *5-6. Thus, the EEOC's "conciliation efforts focused on two individuals ... both of whom worked at the El Centro store," and provided no notice to the employer that it "potentially faced claims on behalf of a nationwide class." *Id.* at *26.

These illustrative examples reflect that, for a variety of reasons, the EEOC's internal incentives to discuss settlement can be overcome by other interests in some cases, with the statutory obligation to conciliate bypassed in favor of an aggressive pursuit of the EEOC's agenda. *See, e.g.*, EEOC Strategic Enforcement Plan (Dec. 2012) ("targeted enforcement necessitates a paradigm shift to focus on specific priorities, recognizing that a focused effort

should have a broad and lasting impact to more effectively advance the agency's mission"); EEOC Newsroom, http://www.eeoc.gov/eeoc/newsroom/index.cfm (listing press releases issued by EEOC upon significant litigation filings or victories). Ultimately, whatever the motivation, that is not the scheme that Congress designed. If these incidents took place *notwithstanding* the prospect of judicial review, it is easy to see how, when the EEOC wants to litigate a case, it may allow its other interests to outweigh its interest in voluntary settlement *absent* that check.

B. Employers Would Have No Reason To Refuse Reasonable Conciliation Offers in Favor of Holding Out for Judicial Review.

The second premise for the Seventh Circuit's conclusion that "review undermines conciliation" (Pet. App. 16a) was that judicial enforcement of the duty would supposedly "invit[e] employers to use the conciliation process to undermine enforcement of Title VII rather than to take the conciliation process seriously as an opportunity to resolve a dispute." (*Id.*) On the view of the court below, allowing courts to enforce the conciliation requirement "tempts employers to turn what was meant to be an informal negotiation into the subject of endless disputes" so that it can "stockpile exhibits for the coming court battle." (*Id.* at 16a-17a.) *Amici* submit that this reasoning is completely unsupported by precedent and practice. It is also blind to the true incentives faced by employers when they are accused by the EEOC of violating civil rights laws.

First, the Seventh Circuit's ahistorical narrative presumes that employers do not seriously want to settle the claims against them. Nothing could be

further from the truth. Most businesses would much prefer to resolve these disputes quickly, quietly, and out of the public eye. Although the Seventh Circuit speculated that employers lose nothing by turning conciliation into a litigation prelude—as "the employer remains free to settle after the EEOC files suit" (Pet. App. 18a)—that ignores the substantial preference of most employers to settle *confidentially*. *See* 42 U.S.C. § 2000e-5(b) (conciliation must be confidential unless parties agree otherwise). A publicly filed EEOC complaint and corresponding press release and publicity can draw considerable attention from employees, investors, shareholders, and others. It harms the company's reputation. It hurts morale. And it may hurt the employer's business. The principal benefit of conciliation, for employers, is that it allows them an opportunity to resolve the case *privately*, without being labeled civil rights violators by a government agency. Employers thus have *every* reason to settle during conciliation—and good reason *not* to throw away that opportunity in the hopes of a settlement down the road, after a suit (with all of its attendant costs) has been filed.

Second, the notion that an employer would reject any *reasonable* offer to avoid a lawsuit in the hopes of later convincing a federal judge that the offer was *unreasonable* simply ignores the deferential posture adopted by all courts with respect to conciliation. Although the Circuits have articulated different standards by which to judge adequacy of conciliation efforts, even courts in Circuits adopting the more rigorous standards agree that the court's "role in reviewing efforts to conciliate, while not inert, is modest." *EEOC v. Bloomberg L.P.*, 751 F. Supp. 2d 628, 637 (S.D.N.Y. 2011); *see also id.* at 639 (refusing

to make any "judgment about the wisdom of the parties' respective conciliation strategies"); *EEOC v. Bass Pro Outdoor World, LLC*, No. 4:11-CV-3425, 2014 U.S. Dist. LEXIS 27019, at *12, *18 (S.D. Tex. Mar. 4, 2014) (conciliation "does *not* require a minitrial" and EEOC is not governed by any "rigid rules and regulations"); *Sears*, 650 F.2d at 18 (agreeing that "Commission should be given wide latitude in shaping both the general framework of conciliation and the specific offers made"). In the vast majority of cases, the EEOC's conciliation efforts satisfy *any* Circuit's test, making it highly irrational for an employer to forfeit the opportunity to resolve a claim during the pre-suit process and instead hold out for judicial review of conciliation.

Third, if a court does find a conciliation violation, it may (depending on the circumstances) dismiss the action in whole or part or stay the case to allow the parties another chance to conciliate. *See* 42 U.S.C. § 2000e-5(f)(1) ("[T]he court may, in its discretion, stay further proceedings ... for ... further efforts of the Commission to obtain voluntary compliance."). Given this statutory authority to review conciliation and fashion an appropriate remedy, it is hard to believe, as the Seventh Circuit asserted, that employers may want to "delay" by asserting frivolous defenses, only to then try to convince a judge to force the EEOC to resume conciliation. (Pet. App. 17a). Employers want to resolve disputes quickly, not pay hefty lawyers' fees indefinitely.

Fourth, the knowledge that a conciliation record may end up before a federal judge would give any employer the added incentive to behave reasonably and make a genuine, good-faith attempt to settle. No

employer wants to get off on the wrong foot with the presiding judge in its case by rejecting reasonable efforts to resolve the dispute amicably. For the very same reason that judicial review would plainly encourage the EEOC to act more reasonably and openly in conducting the conciliation that Congress contemplated, judicial review would encourage employers to do the same—not, as the court below assumed, tempt them to do the opposite.

* * *

In short, if the EEOC satisfies its own basic duty to engage in meaningful negotiation, there is little opportunity for employers to sandbag and little incentive to waste resources on a losing issue. To be sure, there could be some employers who may raise frivolous objections to conciliation, just as there are some employees who raise frivolous discrimination complaints. But the former concern is no reason to eliminate judicial power to address meritorious objections, just as the latter is no reason to refuse to enforce Title VII altogether. Conversely, immunizing the EEOC from judicial review would only encourage it to rush to court, to refuse to share critical information, and to expand its claims without notice to employers. The predictable result will be less conciliation and more litigation. That does not only hurt employers; it also harms employees, who instead of receiving quick and effective relief could be forced to wait years and to submit to intrusive discovery and the hassles of federal litigation before obtaining any relief. This is the very opposite of what Congress wanted when it enacted Title VII.

II. THE DECISION BELOW IS WRONG.

The decision below is not just inconsistent with the policy of conciliation embodied in Title VII, but is also wrong on the law. *First*, the Seventh Circuit's reasoning misstates the relevant inquiry and ultimately lacks a limiting principle. If applied to other statutory schemes, the court's broad reasoning would forbid judicial review of executive compliance with other pre-suit requirements—contradicting this Court's "strong presumption in favor of judicial review of administrative action." *INS v. St. Cyr*, 533 U.S. 289, 298 (2001). *Second*, the contemporaneous legislative record refutes the court's conclusion that Congress intended no judicial review of conciliation; the opinion below improperly revises a careful and intentional congressional compromise. *Third*, the notion that there is no "meaningful standard" by which courts can judge the EEOC's compliance with the statutory obligation is a far too ready concession. Courts have been policing the agency's conciliation efforts for more than four *decades*, and a developed body of law sets forth the minimal standards that meaningful conciliation requires. That multifactor, case-by-case adjudication may be necessary is not a legal basis to abdicate the task altogether.

A. The Seventh Circuit's Refusal To Enforce a Statutory Command Has No Legal Basis and Lacks a Limiting Principle.

In refusing to enforce Title VII's requirement that the EEOC attempt conciliation before suit, the Seventh Circuit emphasized that Title VII does not expressly authorize judicial review and that this case thus presents the question whether to recognize an "implied" affirmative defense under the statute.

This approach is entirely wrong. Courts are presumptively empowered to enforce the law, and to ensure that executive agencies do not exceed their boundaries. Ultimately, the reasoning adopted by the Seventh Circuit lacks a clear limiting principle and stands in substantial tension with the basic framework of the administrative state.

The court observed that Title VII "contains no express provision for an affirmative defense based on an alleged defect in the EEOC's conciliation efforts." (Pet. App. 5a-6a.) True enough: Title VII does not *specifically* direct courts to review whether the EEOC satisfied its conciliation duty, just as it does not *specifically* direct courts to review whether the EEOC received "a charge ... filed by or on behalf of a person claiming to be aggrieved" or whether the EEOC "serve[d] a notice of the charge ... on such employer ... within ten days" or whether the EEOC "determine[d] whether reasonable cause exists"—all of which are prerequisites to suit found in the same statutory provision. 42 U.S.C. § 2000e-5(b). Yet that has not stopped courts—including this Court—from reviewing EEOC compliance with those procedural requirements. *See, e.g.*, *Shell Oil*, 466 U.S. 54 (reviewing sufficiency of Commissioner's charge and notice to employer). The reason is that Title VII *does* say that federal courts "shall have jurisdiction of actions brought under this subchapter," 42 U.S.C. § 2000e-5(f)(3); and that suffices to give them the authority to adjudicate suits pursued by the EEOC—including to resolve contentions that the EEOC did not satisfy the prerequisites to such suits.

By analogy, the court drew upon the Supreme Court's jurisprudence disfavoring "implied rights of

action." (Pet. App. 19a.) The crucial point, however, is that in an implied right of action case, the *plaintiff* is invoking the court's jurisdiction and seeking judicial intervention. *See, e.g.*, *Alexander v. Sandoval*, 532 U.S. 275 (2001) (plaintiff sued to enforce federal regulation against state executive agency); *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002) (plaintiff sought to sue university for damages for violating federal statute governing release of educational records). By contrast, in the Title VII context it is the *EEOC* who is suing the *employer*, 42 U.S.C. § 2000e-5(f), and the employer defendant is simply asking the court to enforce the statutory prerequisites to such an action. In other words, Title VII plainly contemplates federal suits by the EEOC to enforce the law, and judicial enforcement of the statute. The only question is whether the court should enforce the *entire* statutory scheme, including the parts requiring the EEOC to undertake an administrative process before bringing suit—or, rather, enforce it only selectively. This Court's implied right-of-action jurisprudence offers no support for the latter approach.

In the end, the Seventh Circuit's reasoning has no limiting principle. As Petitioner has shown, Congress often imposes statutory preconditions to suit. (*See* Pet. 23 (citing *Hallstron v. Tillamook Cnty.*, 493 U.S. 20, 31 (1989); *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 157-58 (2010); *Jones v. Bock*, 549 U.S. 199, 211-12 (2007); *United States v. Zucca*, 351 U.S. 91, 94 (1956); *United States v. Felt & Tarrant Mfg. Co.*, 283 U.S. 269, 272 (1931).) In these situations, the statute does not *expressly* say that failure to comply provides an "affirmative defense,"

but the courts nonetheless understand that without satisfaction of the condition, the case cannot proceed.

The Seventh Circuit's assurance that EEOC officials are subject, in theory, to the oversight of Congress, and "are appointed by the President with the advice and consent of the Senate" (Pet. App. 20a-21a), only underscores the breadth of its position. *All* agencies are potentially subject to congressional influence, and *all* agencies have their heads appointed by the President or senior-level officers. *See* U.S. Const. art. I, §§ 7-8; art. II, § 2. But, of course, that has never been viewed as a reason to free agencies from judicial review of their statutory constraints. The Seventh Circuit's contrary logic has no legal basis and should be rejected.

B. The Contemporaneous Legislative Record Refutes the Seventh Circuit's Decision.

The Seventh Circuit's holding that Congress did not intend for courts to enforce the statutory duty to conciliate is also refuted by the 1972 amendments to Title VII, which authorized the EEOC to bring enforcement actions in court after compliance with its pre-suit obligations. Specifically, early drafts of those amendments expressly specified that no judicial review of conciliation would be had—but the final, enacted amendments dropped that language, as part of a broader set of revisions that were designed to limit the EEOC's power and give federal courts greater oversight. The opinion below would undo that congressional choice to establish firm limits on the EEOC's litigation authority.

Early versions of the 1972 amendments to Title VII expressly stated that the EEOC may proceed with a lawsuit against an employer if it cannot

secure "a conciliation agreement acceptable to the Commission, *which determination shall not be reviewable in any court.*" S. 2515, 92d Cong., § 4(f) (1971) (emphasis added). Skeptics of EEOC authority initially sought to amend the bill to delete that phrase, and their efforts—initially—failed. *See EEOC v. Sears, Roebuck & Co.*, 504 F. Supp. 241, 262 (N.D. Ill. 1980) But, following that skirmish, the bill *was unable to pass.* Instead, the entire bill was replaced by a substitute amendment proposed by Senator Dominick, *see Chandler v. Roudebush*, 425 U.S. 840, 855-57 (1976); *Occidental Life*, 432 U.S. at 361-66; and that version, which Congress ultimately enacted, *does not include the italicized language precluding judicial review. See* 42 U.S.C. § 2000e-5(f)(1). Removing that language was a compromise measure necessary to secure the bill's passage, acceding to the views of those skeptical Senators who believed that EEOC conciliation needed "some oversight." 118 Cong. Rec. 3804 (Feb. 14, 1972).

Indeed, the bill ultimately enacted by Congress differed dramatically from the amendments initially proposed. The initial draft would have given the EEOC the power to adjudicate complaints and issue cease-and-desist orders. *See Occidental Life*, 432 U.S. at 361-64. But that proposal provoked an outcry from Members of Congress who sought to guarantee employers the protections and oversight of an Article III court. *See id.*; *Chandler*, 425 U.S. at 850 (describing how "[t]he grant of cease-and-desist power to the EEOC provoked strong dissenting statements"). Senator Dominick, whose substitute bill was ultimately adopted, criticized the initial bill as allowing the EEOC to act, in "Star Chamber" fashion, as "investigator, prosecutor, trial judge and

judicial review board," without any independent judicial check. 117 Cong. Rec. 40290 (Nov. 10, 1971); *see also, e.g.*, S. Rep. No. 92-415 at 85 (1971) (recording the views of the initial Committee dissent, including Senator Dominick, that civil rights litigation ought to be supervised by "[f]ederal court judges who, shielded from political influence by life tenure, are more likely to withstand political pressures and render their decisions in a climate tempered by judicial reflection").

These fears—of a runaway, politicized agency beyond the reach of the federal courts—motivated Congress to scrap cease-and-desist authority for the EEOC and simultaneously to *eliminate* the barrier to judicial review of conciliation. The Seventh Circuit's rewriting of that conscious congressional choice was therefore plainly inappropriate. Put another way, a Congress worried about giving a "blank legislative check," 117 Cong. Rec. 38402 (Nov. 1, 1971) (Sen. Allen), to the "crusaders" at the EEOC, 118 Cong. Rec. 1976 (Feb. 1, 1972) (Sen. Ervin), would hardly have intended for the judicial branch to blindly trust that agency, as the Seventh Circuit now will.

C. As Four Decades of Jurisprudence Shows, Courts Have No Trouble Applying Title VII's Conciliation Requirement.

The Seventh Circuit also put considerable emphasis on the supposed absence of a "meaningful standard" by which it could enforce the obligation to attempt conciliation. (*See* Pet. App. 9a-10a.) As the 40-year history of judicial review of conciliation shows, however, that concern is greatly overstated. Challenges to EEOC conciliation may be *fact-intensive*, but that hardly makes them unreviewable.

Ever since the 1972 amendments were enacted, courts have been enforcing the EEOC's conciliation duty. *See EEOC v. Container Corp. of Am.*, 352 F Supp. 262, 263-66 (M.D. Fla. 1972) (in "first" suit pursued by EEOC, holding that "to foreclose judicial inquiry into the satisfaction of the conditions [such as conciliation] would eliminate them from the Act"). A well-developed body of law has since emerged, recognizing certain basic principles. For example: The EEOC cannot conciliate in an "all-or-nothing" fashion. *Pet*, 612 F.2d at 1002. In class action cases, the EEOC must give the employer sufficient information about the number of affected individuals to evaluate its potential exposure. *CRST*, 679 F.3d at 678. The EEOC must provide enough time for the employer to consider its offers. *Asplundh Tree*, 340 F.3d at 1260. Of course there are divergences among the lower courts on some questions (*see* Pet. App. 10a n.2), just as the lower courts diverge on many other issues. And because the inquiry is necessarily fact-intensive and case-specific—what is required to ensure a "meaningful" conciliation will be different in one case from another—certain questions may not have categorical yes-or-no answers. (Pet. App. 10a.) But that does not make the inquiry unmanageable. Courts have been managing it for decades.

The Seventh Circuit critiqued the "good faith" test adopted by some courts as too "difficult ... to enforce." (Pet. App. 11a (quoting *Doe v. Oberweis Dairy*, 456 F.3d 704, 711 (7th Cir. 2006)).) And, to be sure, some courts may prefer to phrase the inquiry in more objective terms (such as the requirement of a "meaningful" chance to conciliate, *CRST*, 679 F.3d at 676). But courts apply "good faith" inquiries *all the time*. *See, e.g.*, *United States v. Leon*, 468 U.S. 897,

920 (1984) (exclusionary rule inapplicable if officer acted in "good faith"); *Hudson v. McMillian*, 503 U.S. 1, 7 (1992) (excessive force inquiry turns on whether force was applied in "good-faith"); *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288 (1938) (in diversity cases, sum claimed by plaintiff controls "if the claim is apparently made in good faith"). And, in the labor context, Congress wrote a good-faith *negotiation* duty into the law, 29 U.S.C. § 158(d), as the court below conceded. (Pet. App. 11a.) With so many practical manifestations, the good-faith test simply cannot be condemned as unworkable.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

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JOINT APPENDIX

RECORD
AND
BRIEFS

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IN THE

Supreme Court of the United States

MACH MINING, LLC,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

JOINT APPENDIX

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TABLE OF CONTENTS

TABLE OF CONTENTS i

APPENDIX A, District Court Docket Entries 1

APPENDIX B, Court of Appeals Docket Entries 10

APPENDIX C, Charge of Discrimination 13

APPENDIX D, Determination of Charge 14

APPENDIX E, Conciliation Failure Notice 18

APPENDIX F, Complaint 20

APPENDIX G, Answer 27

APPENDIX H, EEOC Letter May 16, 2012 35

APPENDIX I, Mach Letter May 21, 2012 37

APPENDIX J, Notice of Deposition of EEOC 39

APPENDIX K, Defendant's Requests for Admission 47

APPENDIX L, Defendant's Requests for Admission Directed to Vivian J. Beasley 55

APPENDIX M, EEOC's Response to Requests for Admission 60

APPENDIX N, Notice of Withdrawal of EEOC's First Requests for Admissions 83

APPENDIX O, EEOC Letter Sep. 13, 2012 85

APPENDIX A

District Court Docket Entries in Civil Action No. 3:11-cv-00879-JPG-PMF

Sept. 27, 2011 – Complaint by Plaintiff EEOC

Nov. 9, 2011 – Agreed Motion for Protective Order by Plaintiff EEOC

Nov. 15, 2011 – Agreed Protective Order by Magistrate Judge Frazier

Nov. 28, 2011 – Entry of Appearance by Defendant Mach Mining, LLC

Nov. 28, 2011 – Defendant's Answer and Affirmative Defenses by Defendant Mach Mining, LLC

Nov. 28, 2011 – Entry of Appearance by Defendant Mach Mining, LLC

Nov. 30, 2011 – Entry of Appearance by Plaintiff EEOC

Dec. 8, 2011 – Uniform Trial Practice and Procedures by Clerk of Court

Dec. 13, 2011 – Notice to Counsel by Clerk of Court

Jan. 24, 2012 – Order For and Notice of Settlement Conference by Magistrate Judge Frazier

Apr. 11, 2012 – Disclosure of Corporation Interests Certificate by Defendant Mach Mining, LLC

May 25, 2012 – Plaintiff EEOC's Motion to Deem Confidentiality of Conciliation Process to Have Been Waived by Defendant by Plaintiff EEOC

June 11, 2012 – Defendant's Opposition to Plaintiff's Motion to Deem Confidentiality of Conciliation Waived by Defendant Mach Mining, LLC

June 21, 2012 – Entry of Appearance by Plaintiff EEOC

June 27, 2012 – Defendant Mach Mining, LLC's First Request for Admission Directed to Plaintiff by Defendant Mach Mining, LLC

June 29, 2012 – EEOC's Responses to Defendant Mach Mining, LLC's Requests for Admission Directed to Plaintiff Regarding Each Claimant by Plaintiff EEOC

July 13, 2012 – Order by Magistrate Judge Frazier

July 16, 2012 – Motion for Extension of Time to Answer Discovery by Defendant Mach Mining, LLC

July 30, 2012 – Plaintiff EEOC's Motion for Summary Judgment on Defendant's Failure to Conciliate Affirmative Defense by Plaintiff EEOC

July 31, 2012 – Entry of Appearance by Plaintiff EEOC

Aug. 31, 2012 – Minutes of Court and Minute Order by Deputy Clerk of Court

Sept. 10, 2012 – Minutes of Court and Minute Order by Deputy Clerk of Court

Oct. 11, 2012 – Entry of Appearance by Plaintiff EEOC

Oct. 15, 2012 – Transcript of Discovery Dispute Conference by Clerk of Court

Oct. 18, 2012 – Defendant Mach Mining, LLC's Memorandum in Opposition to EEOC's Motion for Partial Summary Judgment by Defendant Mach Mining, LLC

Oct. 24, 2012 – Notice of Intent to Request Redaction by Defendant Mach Mining, LLC

Oct. 30, 2012 – Plaintiff EEOC's Reply in Support of EEOC's Motion for Summary Judgment on Mach's Failure to Conciliate Affirmative Defense by Plaintiff EEOC

Oct. 30, 2012 – Plaintiff EEOC's Motion to Strike "Section F" of Defendant Mach Mining's Memorandum in Opposition to EEOC's Motion for Partial Summary Judgment by Plaintiff EEOC

Nov. 5, 2012 – Motion to Withdraw Defendant's Notice of Intent to Request Redaction by Defendant Mach Mining, LLC

Nov. 6, 2012 – Defendant's Motion to Clarify the Court's Discovery Order by Defendant Mach Mining, LLC

Nov. 13, 2012 – Defendant Mach Mining, LLC's Memorandum in Opposition to EEOC's Motion to Strike by Defendant Mach Mining, LLC

Jan. 4, 2013 – Minutes of Court and Minute Order by Deputy Clerk of Court

Jan. 14, 2013 – Transcript of Discovery Dispute Conference by Clerk of Court

Jan. 28, 2013 – Memorandum and Order by District Judge Gilbert

Feb. 26, 2013 – EEOC's First Set of Requests for Admissions to Defendant Mach Mining, LLC by Plaintiff EEOC

Mar. 21, 2013 – Plaintiff EEOC's Motion to Reconsider or to Certify Under 1292(b) This Honorable Court's Opinion and Order of January 28, 2013 by Plaintiff EEOC

Mar. 21, 2013 – Motion for Protective Order Regarding Discovery Related to Conciliation by Plaintiff EEOC

Mar. 28, 2013 – Defendant Mach Mining, LLC's Responses to EEOC's First Set of Requests for Admissions by Defendant Mach Mining, LLC

Mar. 28, 2013 – EEOC's Motion for a Protective Order as to Subpoenas Directed to the Claimants' Past and Current Employers by Plaintiff EEOC.

Apr. 8, 2013 – Defendant's Opposition to EEOC's Motion to Reconsider or to Certify Under 1292(b) This Honorable Court's Opinion and Order of January 28, 2013 by Defendant Mach Mining, LLC

Apr. 8, 2013 – Defendant's Opposition to EEOC's Motion for Protective Order Related to Conciliation Matters by Defendant Mach Mining, LLC

Apr. 11, 2013 – Defendant Mach Mining, LLC's Memorandum in Opposition to EEOCs Motion for Protective Order as to Subpoenas Directed to the Claimant's Past and Current Employers by Defendant Mach Mining, LLC

Apr. 11, 2013 – Plaintiff EEOC's Motion to Continue or the April 16, 2013 Discovery Dispute Conference or to Permit EEOC to Appear Telephonically by Plaintiff EEOC

Apr. 15, 2013 – Plaintiff EEOC's Reply in Support of Its Motion to Reconsider or to Certify Under 1292(b) This Honorable Court's Opinion and Order of January 28, 2013 by Plaintiff EEOC

Apr. 15, 2013 – Reply in Support of Motion for Protective Order Regarding Discovery Related to Conciliation by Plaintiff EEOC

Apr. 16, 2013 – Plaintiff EEOC's Motion for Oral Argument by Plaintiff EEOC

Apr. 23, 2013 – Order by Magistrate Judge Frazier

Apr. 25, 2013 – Entry of Appearance by Defendant Mach Mining, LLC

Apr. 25, 2013 – Notice of Withdrawal by Defendant Mach Mining, LLC

Apr. 29, 2013 – Plaintiff EEOC's Fed. R. Civ. P. 72 Objections to the Denial of EEOC's Motion for a Protective Order Regarding Discovery by Plaintiff EEOC

May 6, 2013 – Defendant Mach Mining, LLC's Opposition to EEOC's Rule 72 Objections to the Denial of EEOC's Motion for Protective Order by Defendant Mach Mining, LLC

May 7, 2013 – Minutes of Court by Clerk of Court

May 8, 2013 – Minutes of Court by Clerk of Court

May 16, 2013 – Minutes of Court and Minute Order by Deputy Clerk

May 16, 2013 – Minutes of Court by Deputy Clerk

May 20, 2013 – Memorandum and Order by District Judge Gilbert

May 29, 2013 – Transcript of Discovery Dispute by Clerk of Court

May 29, 2013 – Transcript of Motion Hearing by Clerk of Court

June 4, 2013 – Defendant Mach Mining, LLC's Motion and Incorporated Memorandum in Support of Its Motion to Stay Discovery Pending Resolution of Interlocutory Appeal, and Motion for Court-Supervised Settlement Conference by Defendant Mach Mining, LLC

June 28, 2013 – USCA Order by Clerk of Court

June 28, 2013 – Notice of Appeal by Clerk of Court

July 2, 2013 – Transmission of Short Record to US Court of Appeals Regarding Notice of Appeal by Clerk of Court

July 2, 2013 – Notice of the Filing of a Notice of Appeal by Deputy Clerk of Court

July 2, 2013 – Notice of Docketing USCA Case by Clerk of Court

Sept. 27, 20134 – Request from USCA to Transmit Record on Appeal by Clerk of Court

Sept. 27, 2013 – Certified and Transmitted Record on Appeal by Deputy Clerk of Court

Sept. 30, 2013 – Acknowledgment of Receipt of Transcripts by Clerk of Court

Sept. 30, 2013 – Acknowledgment of Receipt of Record on Appeal by USCA

Oct. 1, 2013 – Motion of the Equal Employment Opportunity Commission for Continuance Due to Government Shutdown by Plaintiff EEOC

Oct. 2, 2013 – Order by District Judge Gilbert

Feb. 11, 2014 – Notice of Issuance of Mandate of USCA by Clerk of Court

Feb. 22, 2014 – Opinion of USCA by Clerk of Court

Apr. 3, 2014 – Defendant Mach Mining, LLC's Motion and Incorporated Memorandum in Support of Its Motion for Protective Order by Defendant Mach Mining, LLC

May 21, 2014 – Transcript of Motion Hearing by Clerk of Court

May 30, 2014 – Defendant Mach Mining's Fed. R. Civ. P. 72 Objections to Denial of Defendant's Motion for Protective Order by Defendant Mach Mining, LLC

June 2, 2014 – Defendant Mach Mining's Motion to Withdraw and Seal Exhibit B to Doc. 117 by Defendant Mach Mining, LLC

June 4, 2014 – Plaintiff EEOC's Response to Defendant's Objections to Denial of Defendant's Motion for Protective Order by Plaintiff EEOC

June 16, 2014 – Defendant Mach Mining's Reply in Support of Its Fed. R. Civ. P. 72 Objections to Denial of Defendant's Motion for Protective Order by Defendant Mach Mining, LLC

July 7, 2014 – Defendant Mach Mining, LLC's Motion and Incorporated Memorandum in Support of Its Motion to Stay Discovery Pending Supreme Court Review by Defendant Mach Mining, LLC

July 15, 2014 – Plaintiff EEOC's Response to Defendant's Motion for a Stay of All Discovery by Plaintiff EEOC

July 25, 2014 – Defendant Mach Mining, LLC's Reply in Support of Its Motion to Stay Discovery Pending Supreme Court Review by Defendant Mach Mining, LLC

July 25, 2014 – Defendant Mach Mining, LLC's Amended Reply in Support of Its Motion to Stay Discovery Pending Supreme Court Review by Defendant Mach Mining, LLC

August 5, 2014 – Order by Magistrate Judge Frazier

APPENDIX B

Court Of Appeals Docket Entries in Civil Action No. 13-2456

May 30, 2013 – Petition of the Equal Employment Opportunity Commission for Interlocutory Appeal by Petitioner EEOC

June 5, 2013 – Notice to File Response

June 19, 2013 – Mach Mining, LLC's Answer in Opposition to the Petition of the Equal Employment Opportunity Commission for Interlocutory Appeal by Respondent Mach Mining, LLC

June 19, 2013 – Circuit Rule 26.1 Disclosure Statement by Respondent Mach Mining, LLC

June 28, 2013 – Order

July 31, 2013 – Brief of the Equal Employment Opportunity Commission as Plaintiff-Appellant by Appellant EEOC

Aug. 20, 2013 – Entry of Appearance by Appellee Mach Mining, LLC

Aug. 21, 2013 – Brief of Mach Mining, LLC as Defendant-Appellee by Appellee Mach Mining, LLC

Aug. 22, 2013 – Motion of the Equal Employment Opportunity Commission for an Extension to File Reply Brief by Appellant EEOC

Aug. 25, 2013 – Defendant-Appellee's Response to Equal Employment Opportunity Commission's Motion for an Extension to File Reply Brief by Appellee Mach Mining, LLC

Aug. 26, 2013 – Order

Aug. 26, 2013 Circuit Rule 26.1 Disclosure Statement by Appellant EEOC

Aug. 26, 2013 – Brief of the Equal Employment Advisory Council and Society for Human Resource Management as *Amici Curiae* in Support of Defendant-Appellee and in Support of Affirmance by Equal Employment Advisory Council and Society for Human Resource Management

Aug. 28, 2013 – Brief for *Amici Curiae* Retail Litigation Center, Inc., Chamber of Commerce of the United States of America, and National Federation of Independent Business Small Business Legal Center in Support of Defendant-Appellee and Affirmance by Retail Litigation Center, Inc., Chamber of Commerce of the United States of America, and National Federation of Independent Business Small Business Legal Center

Aug. 28, 2013 – Circuit Rule 26.1 Disclosure Statement by Retail Litigation Center, Inc., Chamber of Commerce of the United States of America, and National Federation of Independent Business Small Business Legal Center

Sept. 27, 2013 – Notice of Oral Argument

Sept. 27, 2013 – Notice to District Court

Sept. 27, 2013 – Reply Brief of the Equal Employment Opportunity Commission as Plaintiff-Appellant by Appellant EEOC

Sept. 30, 2013 – Original Record on Appeal

Oct. 1, 2013 – Notice of Unavailability for Oral Argument by Appellant EEOC

Oct. 10, 2013 – Oral Argument Confirmation by Appellee Mach Mining, LLC

Oct. 11, 2013 – Disclosure Statement by Appellee Mach Mining, LLC

Oct. 16, 2013 – Citation of Additional Authority by Appellee Mach Mining, LLC

Oct. 19, 2013 – Oral Argument Confirmation by Appellant EEOC

Dec. 20, 2013 – Opinion of the Court

Dec. 20, 2013 – Final Judgment

Feb. 11, 2014 – Mandate Issued

Feb. 12, 2014 – Entry of Appearance by Appellant EEOC

Feb. 26, 2014 – Notice of Petition of Certiorari Filed with the Supreme Court

June 30, 2014 – Order from Supreme Court

MDC

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974. See enclosed Privacy Act Statement and other information before completing this form.

Charge Presented To: ☐ FEPA ☒ EEOC

Agency(ies) Charge No(s): 440-2008-03421

Illinois Department Of Human Rights and EEOC

State or Local Agency, if any

Name (Include Mr., Ms., Mrs.)	Home Phone (Incl. Area Code)	Date of Birth
Ms. Brooke A. Petkas		

Street Address: 305 West Elm Street, West Frankfort, IL 62896 — City, State and ZIP Code

Named is the Employer, Labor Organization, Employment Agency, Apprenticeship Committee, or State or Local Government Agency That I Believe Discriminated Against Me or Others. (If more than two, list under PARTICULARS below.)

Name	No. Employees, Members	Phone No. (Include Area Code)
MACH MINING	500 or More	(618) 983-3020

Street Address: 16468 Liberty School Road, Marion, IL, 62959 — City, State and ZIP Code

Name	No. Employees, Members	Phone No. (Include Area Code)

Street Address — City, State and ZIP Code

DISCRIMINATION BASED ON (Check appropriate box(es).)

☐ RACE ☐ COLOR ☒ SEX ☐ RELIGION ☐ NATIONAL ORIGIN

☐ RETALIATION ☐ AGE ☐ DISABILITY ☐ OTHER (Specify below.)

DATE(S) DISCRIMINATION TOOK PLACE

Earliest: 06-15-2007 Latest: 03-18-2008

☒ CONTINUING ACTION

THE PARTICULARS ARE (If additional paper is needed, attach extra sheet(s))

On several occasions I have applied for a Coal Mine position with Respondent. Respondent has failed to hire Me.

I believe I have been discriminated against because of my sex, female, In violation of Title VII of the Civil Rights Act of 1964, as amended.

RECEIVED EEOC

Apr 01 2008

CHICAGO DISTRICT OFFICE

I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or phone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the above is true and correct.

3-27-08 Brooke Petkas

Date — Charging Party Signature

NOTARY - When necessary for State and Local Agency Requirements

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE (month, day, year)

APPENDIX C

APPENDIX D

Determination Of Charge

U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION

Chicago District Office

500 West Madison Street, Suite 2000
Chicago, IL 60661
Chicago Direct Dial: (312) 353-2714
ITY (312) 353-2421
FAX (312) 353-4041

Charge Number 440-2008-03421

Brooke Petkas — Charging Party
305 West Elm Street
West Frankfort, Illinois 62896

v.

Mach Mining, LLC — Respondent
16468 Liberty School Road
Marion, Illinois 62959

and

Cline Resource and — Respondent
Development Company
430 Harper Park Drive
Beckley, West Virginia 25801

and

Coal Field Transport, Inc. Respondent
430 Harper Park Drive
Beckley, West Virginia 25801

DETERMINATION

Under the authority vested in me by the Commission's Procedural Regulations, I issue the following determination on the merits of the subject charge filed under Title VII of the Civil Rights Act of 1964 (Title VII), as amended.

The Respondents (herein collectively referred to as "Respondent") are employers within the meaning of Title VII, and all requirements for coverage have been met.

The Charging Party alleged that she was discriminated against because of her sex, female, in that she was denied an interview and was not hired, in violation of Title VII.

I have determined that the evidence obtained during the course of the investigation establishes reasonable cause to believe that Respondent discriminated against Charging Party and a class of female applicants, because of their sex, in that Respondent failed to recruit and hire them, in violation of Title VII.

This determination is final. When the Commission finds that violations have occurred, it attempts to eliminate unlawful practices by informal methods of conciliation. Therefore, I invite the parties to join with the Commission in reaching a just resolution of this matter. Disclosure of information obtained by the Commission during the conciliation process will be made only in accordance with the Commission's Procedural Regulations (29 C.F.R. Part 1601.26).

A representative of this office will be in contact with each party in the near future to begin the conciliation process. When the Respondent declines to enter into conciliation discussions, or when the Commission's representative for any other reason, is unable to secure a conciliation acceptable to the Office Director, the Director shall so inform the parties in writing. The remedies for violations of the statutes we enforce are designed to make the identified victims whole and to provide corrective and preventive relief. These remedies may include, as appropriate, an agreement by the Respondent not to engage in unlawful employment practices, placement of identified victims in positions they would have held but for discriminatory actions, back pay, restoration of lost benefits, injunctive relief, compensatory and/or punitive damages, and notice to employees of the violation and the resolution of the claim.

Should the Respondent have further questions regarding the conciliation process or the conciliation terms it would like to propose, we encourage it to

contact the assigned Commission representative. Should there be no response from the Respondent in 14 days, we may conclude that further conciliation efforts would be futile or nonproductive.

On Behalf of the Commission:

9/17/2010
Date

/s/ John P. Rowe
John P. Rowe
District Director

APPENDIX E

Conciliation Failure Notice

U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION

Chicago District Office

500 West Madison Street, Suite 2000
Chicago, IL 60661
Chicago Direct Dial: (312) 353-2714
ITY (312) 353-2421
FAX (312) 353-4041

R Lance Witcher, Esq.
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
Attorney at Law
7700 Bonhomme Ave
Suite 650
St Louis, MO 63105

Re: Charging Party: Brooke A Petkas
Respondent: MACH MINING
EEOC Charge Number: 440-2008-03421

Dear Mr. Witcher:

The Equal Employment Opportunity Commission has determined that, with respect to the above referenced charge, such conciliation efforts as are required by law have occurred and have been unsuccessful. This letter constitutes the notice required by § 1601.25 of the Commission's Regulations which provide that the Commission shall notify a respondent in writing when it

determines that further conciliation efforts would be futile or non- productive.

Sincerely,

9/15/2011
Date

/s/ John P. Rowe
John P. Rowe
District Director

APPENDIX F

Complaint

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS BENTON DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	CIVIL
	)	ACTION
Plaintiff,	)	NO.
	)	
v.	)	**COMPLAINT**
	)	
Mach Mining, LLC,	)	**JURY**
	)	**TRIAL**
Defendant.	)	**DEMAND**

NATURE OF THE ACTION

This is an action under Title VII of the Civil Rights Act of 1964 and Title I of the Civil Rights Act of 1991 to correct unlawful employment practices on the basis of sex, and to provide appropriate relief to Brooke Petkas and a class of female applicants for non-office jobs who were adversely affected by such

practices. As stated more fully below, Mach Mining,LLC ("Defendant") maintained a policy or practice of not hiring women for mining and related positions, or, in the alternative, had a neutral hiring policy which had a disparate impact on women applicants for mining and related positions.

JURIDICTION AND VENUE

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 451, 1331, 1337, 1343 and 1345. This action is authorized and instituted pursuant to Sections 706(f)(1) and (3) and 707 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-5(f)(1) and (3) and -6 ("Title VII") and Section 102 of the Civil Rights Act of 1991, 42 U.S.C. § 1981a.

2. The employment practices alleged to be unlawful were, and are now being, committed within the jurisdiction of the United States District Court for the Southern District of Illinois, Benton Division.

PARTIES

3. Plaintiff, the Equal Employment Opportunity Commission (the "Commission"), is the agency of the United States of America charged with the administration, interpretation and enforcement of Title VII, and is expressly authorized to bring this action by Sections 706(f)(1) and (3) and 707 of Title VII, 42 U.S.C. "§§ 2000e-5(f)(1) and (3) and -6.

4. At all relevant times, Defendant has continuously been a Delaware corporation doing

business in the State of Illinois and the City of Johnston and the City of Marion, and has continuously had at least 15 employees.

5. At all relevant times, Defendant Employer has continuously been an employer engaged in an industry affecting commerce within the meaning of Sections 701(b), (g) and (h) of Title VII, 42 U.S.C. §§ 2000e(b), (g) and (h).

STATEMENT OF CLAIMS

6. More than thirty days prior to the institution of this lawsuit, Brooke Petkas filed a charge with the Commission alleging violations of Title VII by Defendant. All conditions precedent to the institution of this lawsuit have been fulfilled.

7. Since at least on or about January 1, 2006, Defendant has engaged in a pattern or practice of unlawful employment practices at its Johnston, Illinois facility, in continuing violation of Section 703(a)(1) and Section 707 of Title VII, 42 U.S.C. § 2000e-2(a)(1), and 2000e-6. These practices include, but are not limited to failing or refusing to hire females into mining and related (non-office) positions because of their sex.

8. The effect of the practice complained of in paragraph seven (7) above has been to deprive Brooke Petkas and a class of female applicants of equal employment opportunities and otherwise adversely affect their status as applicants for employment, because of their sex.

9. Since at least January 1, 2006, Defendant has utilized hiring practices that cause a disparate impact on the basis of sex, in continuing violation of 703(a)(1) of Title VII, 42 U.S.C. § 2000e-2(a)(1). These practices include, but are not limited to, hiring only applicants who are referred by current employees.

10. The effect of the practice complained of in paragraph nine (9) above has been to deprive Brooke Petkas and a class of female applicants of equal employment opportunities and otherwise adversely affect their status as applicants for employment, because of their sex.

11. The unlawful employment practices complained of in paragraph seven (7) above were and are intentional.

12. The unlawful employment practices complained of in paragraph seven (7) above were and are done with malice or with reckless indifference to the federally protected rights of Brooke Petkas and a class of female applicants.

PRAYER FOR RELIEF

Wherefore, the Commission respectfully requests that this Court:

A. Grant a permanent injunction enjoining Defendant, its officers, agents, servants, employees, attorneys, and all persons in active concert or participation with them, from engaging in sex discrimination in hiring.

B. Order Defendant to institute and carry out policies, practices, and programs which provide equal employment opportunities for Brooke Petkas and a class of female applicants, and which eradicate the effects of its past and present unlawful employment practices.

C. Order Defendant to make whole Brooke Petkas and a class of female applicants, by providing appropriate backpay with prejudgment interest, in amounts to be determined at trial, and other affirmative relief necessary to eradicate the effects of its unlawful employment practices, including but not limited to the rightful place hiring, or award of front pay and/or future lost earnings in lieu thereof, of Brooke Petkas and a class of female applicants.

D. Order Defendant to make whole Brooke Petkas and a class of female employees, by providing compensation for past and future pecuniary losses resulting from the unlawful employment practices described in paragraph seven (7) above, including relocation expenses, job search expenses, and medical expenses which would have been paid by Defendant's employee benefit plan, if any, in amounts to be determined at trial.

E. Order Defendant to make whole Brooke Petkas and a class of female applicants by providing compensation for past and future nonpecuniary losses resulting from the unlawful practices complained of in paragraph seven (7) above, including emotional pain, suffering, inconvenience, loss of enjoyment of life, and humiliation, in amounts

to be determined at trial.

F. Order Defendant to pay Brooke Petkas and a class of female applicants punitive damages for its malicious and reckless conduct described in paragraph seven (7) above, in amounts to be determined at trial.

G. Grant such further relief as the Court deems necessary and proper in the public interest.

H. Award the Commission its costs of this action.

JURY TRIAL DEMAND

The Commission requests a jury trial on all questions of fact raised by its complaint.

Respectfully submitted,

David Lopez
General Counsel

Jerome Scanlan
Associate General Counsel

Equal Employment Opportunity
Commission
131 M Street, Ne
Washington, Dc 20507

s/ John C. Hendrickson
John C. Hendrickson
Regional Attorney

s/ Gregory Gochanour
Gregory Gochanour
Supervisory Trial Attorney

s/ Ethan M. M. Cohen
Ethan M. M. Cohen
Trial Attorney

Ethan M. M. Cohen
A.R.D.C. No. 6206781
EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
500 W. Madison, Room 2000
Chicago, Illinois 60661
(312) 869-8104
ethan.cohen@eeoc.gov

APPENDIX G

Answer

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS BENTON DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	**Case No. 11-CV-879-JPG-PMF**
Plaintiff,	
v.	
Mach Mining, LLC,	
Defendant.	

DEFENDANT'S ANSWER AND AFFIRMATIVE DEFENSES

For its Answer to Plaintiff's Complaint ("Complaint"), Defendant Mach Mining, LLC ("Defendant") states as follows:

JURISDICTION AND VENUE

1. Defendant denies violating either Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. or Title I of the Civil Rights Act of 1991, 42 U.S.C. § 1981a but nevertheless admits that this Court has jurisdiction over this action. Defendant denies each and every remaining allegation of fact and conclusion of law, if any, set forth in paragraph 1 of Plaintiff's Complaint.

2. Defendant denies engaging in any unlawful employment practices but nevertheless admits venue is proper. Defendant denies each and every remaining allegation of fact and conclusion of law, if any, set forth in paragraph 2 of Plaintiff's Complaint.

PARTIES

3. Defendant admits the allegations set forth in paragraph 3 of Plaintiff's Complaint.

4. Defendant admits it is a Delaware Corporation with at least 15 employees at all relevant times and that it conducts business in the State of Illinois as well as in the cities of Johnston and Marion, Illinois. Defendant denies each and every remaining allegation of fact or conclusions of law, if any, set forth in paragraph 4 of Plaintiff's Complaint.

5. Defendant admits the allegations set forth in paragraph 5 of Plaintiff's Complaint.

STATEMENT OF CLAIMS

6. Defendant admits that Brooke Petkas filed a charge of discrimination with the Commission alleging violations of Title VII by Defendant but denies each and every remaining allegation of fact and conclusion of law set forth in paragraph 6 of Plaintiff's Complaint.

7. Defendant denies engaging in any unlawful employment practices and therefore, denies each and every allegation of fact and conclusion of law set forth in paragraph 7 of Plaintiff's Complaint.

8. Defendant denies engaging in any unlawful employment practices or improperly depriving Brooke Petkas or any other female applicants of employment opportunities and therefore, denies each and every allegation of fact and conclusion of law set forth in paragraph 8 of Plaintiff's Complaint.

9. Defendant admits using a referral system for new hires but denies that such practice is unlawful and therefore, denies each and every allegation of fact and conclusion of law set forth in paragraph 9 of Plaintiff's Complaint.

10. Defendant denies engaging in any unlawful employment practices or improperly depriving Brooke Petkas or any other female applicants of employment opportunities and therefore, denies each and every allegation of fact and conclusion of law set forth in paragraph 10 of Plaintiff's Complaint.

11. Defendant denies each and every allegation of fact and conclusion of law set forth in paragraph 11 of Plaintiff's Complaint.

12. Defendant denies each and every allegation of fact and conclusion of law set forth in paragraph 12 of Plaintiff's Complaint. Defendant denies each and every allegation set forth in the WHEREFORE paragraph as well as all sub-parts thereto.

AFFIRMATIVE DEFENSES

1. Further answering, except as noted herein, Defendant denies each and every allegation contained in Plaintiff's Complaint.

2. Further answering, Defendant asserts that Plaintiff's Complaint must be dismissed because Plaintiff has failed to state a claim upon which relief can be granted.

3. Further answering, Defendant states Plaintiff's Complaint must be dismissed because Plaintiff fai' ! to fulfill all conditions precedent before filin, suit, including but not limited to, conciliating in good faith the allegations at issue herein.

4. Further answering, Defendant asserts that Plaintiff's Complaint must be dismissed because any actions taken by Defendant with respect to Brooke Petkas and all other female applicants were based on lawfu' factors and all such actions were for lawful and proper reasons.

5. Further answering, Defendant denies that any of its employees or agents, acting within the course and scope of their employment or agency, violated any statute or caused damage or injury to Brooke Petkas or any other female applicant.

6. Further answering, Defendant asserts that any unlawful conduct allegedly engaged in by its employees, supervisory or otherwise, which Defendant denies, was outside the scope of their employment and was contrary to Defendant's efforts to comply with any and all applicable laws, including but not limited to Title VII.

7. Further answering, Defendant asserts that Plaintiff's claims are barred for failure to properly and/or timely exhaust administrative remedies.

8. Further answering, Defendant states that Plaintiff's prayer for damages is barred to the extent Brooke Petkas or any other female applicant has failed to use reasonable means to mitigate their alleged losses and damages complained of in Plaintiff's Complaint.

9. Further answering, Defendant asserts that any damages claimed by Brooke Petkas or any other female applicant must be reduced to the extent they have, in fact, earned amounts in mitigation of their damages.

10. Further answering, Defendant asserts that its actions toward Brooke Petkas and any other female applicant were taken in good faith, and that it did not act intentionally or willfully.

11. Further answering, Defendant asserts that Plaintiff's claims are barred by the equitable doctrines of estoppel, laches, waiver and unclean hands.

12. Further answering, Defendant asserts that the claims of Brooke Petkas or any other female applicant may be barred, in whole or in part, by the after-acquired evidence doctrine.

13. Further answering, Defendant asserts that Plaintiff's claims are barred by applicable statutes of limitations or other periods of limitation.

14. Further answering, to the extent that the Complaint should be construed as seeking punitive damages, it violates Defendant's right to protection from excessive fines as provided by the Eighth Amendment to the United States Constitution and pertinent provisions of the Constitution of the State of Illinois, and it violates Defendant's right to substantive and procedural due process provided in the Fifth and Fourteenth Amendments to the United States Constitution and the Constitution of the State of Illinois.

15. Further answering, to the extent that punitive damages are sought in this action, Defendant cannot be held liable for any such punitive damages because any unlawful actions or decisions of its managerial agents or officers would be contrary to Defendant's policy and its good faith efforts to comply with applicable laws, and same

would therefore be outside the scope of their authority.

16. Further answering, to the extent that punitive damages are sought in this action, Defendant asserts that, in the absence of clear and convincing evidence of ill will, spite, malice and willful and wanton conduct, any award of punitive damages would violate the United States Constitution and the Constitution of the State of Illinois.

17. Further answering, Defendant asserts that Plaintiff's claims are barred for failure to exhaust administrative remedies to the extent the allegations contained in Plaintiff's Complaint exceed the scope of the underlying charge of discrimination and/or female applicants failed to timely and properly file charges themselves.

18. Further answering, Defendant expressly reserves the right to assert any additional defenses that become known during discovery. WHEREAS, having fully answered Plaintiff's Complaint, Defendant prays that this Court dismiss Plaintiff's Complaint and provide such other relief as the Court deems just and proper under the circumstances.

WHEREAS, having fully answered Plaintiff's Complaint, Defendant prays that this Court dismiss Plaintiff's Complaint and provide such other relief as the Court deems just and proper under the circumstances.

Respectfully Submitted,

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART

/s/ R. Lance Witcher
R. Lance Witcher, #6279646
Sarah Swatosh, # 56633MO
7700 Bonhomme Avenue, Suite 650
St. Louis, Missouri 63105
(314) 802-3935
(314) 802-3936 (FAX)
Lance.Witcher@ogletreedeakins.com
Sarah.Swatosh@ogletreedeakins.com

Attorneys for Defendant

APPENDIX H

EEOC Letter May 16, 2012

U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Chicago District Office
500 West Madison Street, Suite 2000
Chicago, IL 60661

Ann Henry
Trial Attorney
Ann.henry@eeoc.gov

Direct Dial: (312) 869-8104
TTY: (312) 869-8001
Facsimile: (312) 869-8124

VIA ELECTRONIC MAIL

May 16, 2012

R. Lance Witcher
lance.witcher@ogletreedeakins.com
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
7700 Bonhomme Ave Suite 650
St. Louis, MO 63105

Re: *EEOC v. Mach Mining,* 11-879-JPG/PMFF

Dear Lance:

I am writing to follow up on EEOC's request that Mach Mining agree to waive Title VII's confidentiality provisions with respect to conciliation. On January 26, 2012, Ethan Cohen requested that Mach waive confidentiality regarding conciliation, as

Defendant has raised the issue of EEOC's conciliation obligations as a defense to the complaint. That day, you responded that Mach wanted to explore the possibility of early settlement, so there was no need for Mach to raise the issue of the adequacy of conciliation, and that you wanted to wait until after a settlement conference or settlement discussions took place. On April 24, 2012, I renewed EEOC's request that Mach waive confidentiality regarding conciliation because it was evident that settlement was not imminent, and Mach had objected to a number of EEOC's discovery requests on the basis that EEOC allegedly failed to give Mach an opportunity to conciliate claims of class members other than Brooke Petkas. Mach has not responded directly to my April 24, 2012 letter, but in a May 4, 2012 letter regarding EEOC's discovery responses, you wrote that Mach has not waived Title VII's confidentiality provisions.

Unless Mach informs us by Friday, May 18, 2012, that it has agreed to waive confidentiality regarding conciliation, EEOC will a file a motion requesting that the Court deem Mach to have waived confidentiality by putting conciliation at issue through its Answer to EEOC's Complaint.

Sincerely,

/s/ Ann Henry
Ann Henry

APPENDIX I

Mach Letter May 21, 2012

OGLETREE, DEAKINS,
NASH, SMOAK & STEWART,
P.C.
Attorneys at Law
7700 Bonhomme Avenue,
Suite 650 St. Louis, MO 63105
Telephone: 314.802.3935
Facsimile: 314.802.3936
www.ogletreedeakins.com

R. Lance Witcher
314.802.3948
lance.witcher@ogletreedeakins.com

May 21, 2012

Ann Henry
EEOC Trial Attorney
500 W. Madison, Suite 2000
Chicago, Illinois, 60661

Re: *EEOC v Mach Mining, LLC*
Case No. 3 11-CV-879-JPG-PMF

Dear Ms. Henry,

We are writing in response to your May 16, 2012 letter. Please be advised that Defendant does not waive the confidentiality that attached to the

conciliation process in the matter of *Brooke Petkas v. Mach Mining, LLC,* Charge No.: 440-2008-03421. The request that Defendant waive confidentiality is premature. Defendant has not yet filed a motion to dismiss regarding the Equal Employment Opportunity Commission's ("EEOC") failure to conciliate in good faith. Instead, Defendant is merely seeking information about EEOC's conciliation efforts through the discovery process. As I am sure you know, Defendant is entitled to information from the conciliation process that may ultimately support a failure to conciliate in good faith argument.

That said, if Defendant files its motion to dismiss, Defendant will not object to the EEOC's efforts to oppose the motion with what may be confidential information from the conciliation process provided that the EEOC does not disclose any more than is reasonably necessary to oppose the motion and that such opposition is filed under seal. Defendant is not now, and will not in the future, agree to the use of such information for any other purpose during or after this litigation.

Sincerely,

/s/ R. Lance Witcher
R. Lance Witcher

APPENDIX J

Notice of Deposition of
Equal Employment Opportunity Commission

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS
BENTON DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	**Case No. 3:11-CV-879-JPG-PMF**
Plaintiff,	)	
v.	)	
Mach Mining, LLC,	)	
Defendant.	)	

NOTICE OF DEPOSITION OF EQUAL EMPLOYMENT OPPORTUNITY COMMISSION PURSUANT TO RULE 30(B)(6)

Pursuant to Federal Rule of Civil Procedure 30(b)(6), Plaintiff Defendant Mach Mining, LLC ("Mach Mining"), by counsel, gives notice that it will take the deposition upon oral examination of

Plaintiff Equal Employment Opportunity Commission ("EEOC") at 9:30 a.m. on July 25, 2012, at the offices of Ogletree, Deakins, Nash, Smoak & Stewart, P.C., 155 N. Wacker Drive, Suite 4300, Chicago, Illinois 60606. The matter on which examination is contemplated are described in Attachment A. EEOC shall designate one or more officers, directors, managing agents, or other persons to testify on its behalf regarding each of the matters designated in Attachment A. This deposition will be videotaped and recorded stenographically before a Notary Public or other officer authorized to administer oaths, and will be for the purpose of discovery of evidence, for use at trial, and for other lawful purposes. The deposition will continue from day to day until completed.

Dated: May 30, 2012

Respectfully submitted,
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART

/s/ R. Lance Witcher

R. Lance Witcher, #6279646
Sarah Swatosh, # 56633MO
7700 Bonhomme Avenue, Suite 650
St. Louis, Missouri 63105
(314) 802-3935
(314) 802-3936 (FAX)
Lance.Witcher@ogletreedeakins.com
Sarah.Swatosh@ogletreedeakins.com

Attorneys for Defendant

ATTACHMENT A
TO NOTICE OF DEPOSITION OF
EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION PURSUANT TO FEDERAL
RULE CIVIL PROCEDURE 30(B)(6)

I. DEFINITIONS

A. "Document" or "documents" shall be construed in its broadest sense, including any writing, record, e-mail, computer stored or generated data (whether it is stored on a server, PDA, hard drive, retrievable file, or on a disk of any kind) or other graphic matter of any type or description including, but not limited to, originals (or if you lack the original, whatever type of copy you have) of any agreements, correspondence, purchase orders, invoices, receipts, contracts, letters, electronic mail, telegrams, office communications, memoranda, reports, records, instructions, activity reports, handwritten notes, notebooks, scrap books, journals, diaries, appointment books, photographs, photocopies, charts, motion pictures, video tapes, audio tapes, records, published or unpublished speeches or articles, publications, files, filing systems, file cards, and descriptions of telephone conversations in your possession, custody or control, wherever located, however produced or reproduced, including any identical or non-identical copy whether a draft or a final version.

B. "Evidencing," "concerning," "constituting," "relating to," "in connection with" or "referring to" (or

any form thereof) shall mean constituting, reflecting, respecting, supporting, contradicting, referring to, stating, describing, recording, noting, embodying, containing, mentioning, studying, analyzing, discussing, evaluating, or any other manner relevant thereto.

C. As used herein, "and," "or," "and/or," "any," and "each" all have interchangeable meanings, and these terms are to be read and responded to in the most inclusive and expansive fashion possible.

D. "Person" and "persons" as used in these discovery requests means any individual, firm, partnership, corporation, committee, association, political action group, or other entity.

E. The terms "communication" and "communicated" mean the transmittal of information by any means.

F. The term "EEOC" means the Equal Employment Opportunity Commission and all representatives, agents, and all persons acting on its behalf.

G. The term "Mach" means Mach Mining LLC, its affiliates, predecessors, present and former agents, employees, attorneys and representatives, and all other persons acting for or on behalf of Mach Mining.

H. The term "EEOC Claimants" means the individuals identified in Plaintiff's Initial and Amended Rule 26 Disclosures as follows: Vivian J. Beasley, Dixie J. Beavers, Susan J. Blades, Carla

Bozarth, Holly Brooks, Andrea L. Bruington, Kathryn E. Carney, Julie Carter, Heather C. Clark, Carrie Ann Cox, Amanda Davis, Wendy J. DalMonte, Debbie Edwards, Sandra Finney, Karen Gerl, Pamala L. Grimsley-Bynum, Kimberly Hall-Seagraves, Jacquelynn D. Harris, Tonya M. Herron, Kitty Hitt, Carrie Johnson, Benita C. Jordan, Elizabeth Kilman, Christina Laskowski, Jenna N. Massa, Arleen M. Meracle, Sandra Pagliai, Brooke Petkas, Amy Pritchett, Paula Pyle, Judy Rains, Debbie Rasor, Sherry Robinson, Leslie R. Rolla, Dawn Sanders, Donnita K. Shaw, Amanda Smith, Bobbi Jo Smith, Christi L. Tarr, Julie A. Threet, Janice L. Vancil, Dana A. Webb, Kathi Wolf-Starnes, Delana J. Yates, any future claimants, and all of their representatives, agents, and all persons acting on her behalf.

I. Whenever a noun appears, it shall be construed either to be singular or plural to bring within the scope of these discovery requests any information that may otherwise be construed to be outside their scope.

II. DEPOSITION SUBJECTS

1. The scope of the investigation conducted by the EEOC with regard to Brooke Petkas' March 2008 Charge of Discrimination (Charge No. 440-2008-03421) filed against Mach Mining (the "Charge of Discrimination");

2. The identity of all individuals interviewed by the EEOC throughout the course of its investigation

with regard to the Charge of Discrimination, as well as their knowledge of this matter;

3. The documents, declarations, or other evidence collected by the EEOC during its investigation of the Charge of Discrimination;

4. Any and all facts which support the EEOC's determination that "the evidence obtained during the investigation establishes reasonable cause to believe that [Mach Mining] discriminated against [Petkas] and a class of female applicants, because of their sex" as contained in the EEOC's September 17, 2010 Letter of Determination regarding the Charge of Discrimination;

5. The identity and title of all employees or interns of the EEOC who investigated the Charge of Discrimination;

6. Factual findings of the Field Investigator(s) who investigated the Charge of Discrimination;

7. The identity of all individuals the EEOC communicated with regarding the EEOC and Mach Mining's conciliation efforts.

8. The identity of each EEOC Claimant the EEOC communicated with regarding the EEOC and Mach Mining's conciliation efforts.

9. The substance of each discussion with each EEOC Claimant regarding the EEOC and Mach Mining's conciliation efforts.

10. Factual information and documents that support or rebut Plaintiff's allegation in the Complaint that Mach Mining "maintained a policy or

practice of not hiring women for mining and related positions, or, in the alternative, had a neutral hiring policy which had a disparate impact on women applicants for mining and related positions."

11. Factual information and documents that support or rebut Plaintiff's allegation in the Complaint that Mach Mining's "practice[] has been to deprive Brooke Petkas and a class of female applicants of equal employment opportunities and otherwise adversely affect their status as applicants for employment, because of their sex."

12. Factual information and documents that support or rebut Plaintiff's allegation in the Complaint that Mach Mining's "Since at least on or about January 1, 2006, Defendant has engaged in a pattern or practice of unlawful employment practices at its Johnston, Illinois facility, [by] failing or refusing to hire females into mining and related (non-office) positions because of their sex."

13. Factual information and documents that support or rebut Plaintiff's allegation in the Complaint that Mach Mining's "practice[] were and are done with malice or with reckless indifference to the federally protected rights of Brooke Petkas and a class of female applicants"

14. Policies, procedures, practices and criteria used by Plaintiff that determine or affect the scope of the investigation conducted or complaint brought by Plaintiff on behalf of a EEOC Claimants, including but not limited to the factors taken into account when determining the group of persons who

potentially may be aggrieved by allegations or factors identified in an underlying charge(s).

15. Policies, procedures, practices and criteria used by Plaintiff for conducting statistical analysis pertaining to disparate impact described in Plaintiff's complaint.

16. Requirements, policies, practices, or procedures of Plaintiff relating to the use or consideration of referrals in employment or hiring decisions.

APPENDIX K

Defendant's First Requests for Admission

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS
BENTON DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	**Case No. 3:11-CV-879-JPG-PMF**
Plaintiff,	)	
v.	)	
Mach Mining, LLC,	)	
Defendant.	)	

DEFENDANT MACH MINING, LLC'S FIRST REQUESTS FOR ADMISSION DIRECTED TO PLAINTIFF

Defendant Mach Mining, LLC, pursuant to Rule 36 of the Federal Rules of Civil Procedure,

requires answers to the following Requests for Admission:

- Defendant's First Request for Admission directed to Plaintiff regarding Vivian Beasley, attached hereto as Attachment 1;

- Defendant's First Request for Admission directed to Plaintiff regarding Dixie Beavers, attached hereto as Attachment 2;

- Defendant's First Request for Admission directed to Plaintiff regarding Susan J. Blades, attached hereto as Attachment 3;

- Defendant's First Request for Admission directed to Plaintiff regarding Holly Brooks, attached hereto as Attachment 4;

- Defendant's First Request for Admission directed to Plaintiff regarding Andrea L. Bruington, attached hereto as Attachment 5;

- Defendant's First Request for Admission directed to Plaintiff regarding Kathryn E. Carney, attached hereto as Attachment 6;

- Defendant's First Request for Admission directed to Plaintiff regarding Heather C. Clark, attached hereto as Attachment 7;

- Defendant's First Request for Admission directed to Plaintiff regarding Carrie Ann Cox, attached hereto as Attachment 8;

- Defendant's First Request for Admission directed to Plaintiff regarding Wendy J. Dalmonte, attached hereto as Attachment 9;

- Defendant's First Request for Admission directed to Plaintiff regarding Sandra Finney, attached hereto as Attachment 10;

- Defendant's First Request for Admission directed to Plaintiff regarding Karen Gerl, attached hereto as Attachment 11;

- Defendant's First Request for Admission directed to Plaintiff regarding Pamela Grimsley-Bynum, attached hereto as Attachment 12;

- Defendant's First Request for Admission directed to Plaintiff regarding Kimberly Hall-Seagraves, attached hereto as Attachment 13;

- Defendant's First Request for Admission directed to Plaintiff regarding Jacquelynn D. Harris, attached hereto as Attachment 14;

- Defendant's First Request for Admission directed to Plaintiff regarding Tonya M. Herron, attached hereto as Attachment 15;

- Defendant's First Request for Admission directed to Plaintiff regarding Kitty Hitt, attached hereto as Attachment 16;

- Defendant's First Request for Admission directed to Plaintiff regarding Carrie Johnson, attached hereto as Attachment 17;

- Defendant's First Request for Admission directed to Plaintiff regarding Benita C. Jordan, attached hereto as Attachment 18;

- Defendant's First Request for Admission directed to Plaintiff regarding Jenna N. Massa, attached hereto as Attachment 19;

- Defendant's First Request for Admission directed to Plaintiff regarding Arleen M. Meracle, attached hereto as Attachment 20;

- Defendant's First Request for Admission directed to Plaintiff regarding Sandra Pagliaa, attached hereto as Attachment 21;

- Defendant's First Request for Admission directed to Plaintiff regarding Brooke Petkas, attached hereto as Attachment 22;

- Defendant's First Request for Admission directed to Plaintiff regarding Amy Pritchett, attached hereto as Attachment 23;

- Defendant's First Request for Admission directed to Plaintiff regarding Debbie Rasor, attached hereto as Attachment 24;

- Defendant's First Request for Admission directed to Plaintiff regarding Leslie R. Rolla, attached hereto as Attachment 25;

- Defendant's First Request for Admission directed to Plaintiff regarding Dawn Sanders, attached hereto as Attachment 26;

- Defendant's First Request for Admission directed to Plaintiff regarding Donnita K. Shaw, attached hereto as Attachment 27;

- Defendant's First Request for Admission directed to Plaintiff regarding Bobbi Jo Smith, attached hereto as Attachment 28;

- Defendant's First Request for Admission directed to Plaintiff regarding Christi L. Tarr, attached hereto as Attachment 29;

- Defendant's First Request for Admission directed to Plaintiff regarding Julie A. Threet, attached hereto as Attachment 30;

- Defendant's First Request for Admission directed to Plaintiff regarding Janice L. Vancil, attached hereto as Attachment 31;

- Defendant's First Request for Admission directed to Plaintiff regarding Dana A. Webb attached hereto as Attachment 32;

- Defendant's First Request for Admission directed to Plaintiff regarding Kathi Wolf-Starnes, attached hereto as Attachment 33;

- Defendant's First Request for Admission directed to Plaintiff regarding Delana J. Yates, attached hereto as Attachment 34;

- Defendant's First Request for Admission directed to Plaintiff regarding Carla Bozarth, attached hereto as Attachment 35;

- Defendant's First Request for Admission directed to Plaintiff regarding Julie Carter, attached hereto as Attachment 36;

- Defendant's First Request for Admission directed to Plaintiff regarding Amanda Davis, attached hereto as Attachment 37;

- Defendant's First Request for Admission directed to Plaintiff regarding Debbie Edwards, attached hereto as Attachment 38;

- Defendant's First Request for Admission directed to Plaintiff regarding Elizabeth Kilman, attached hereto as Attachment 39;

- Defendant's First Request for Admission directed to Plaintiff regarding Christina Laskowski, attached hereto as Attachment 40;

- Defendant's First Request for Admission directed to Plaintiff regarding Paula Pyle, attached hereto as Attachment 41;

- Defendant's First Request for Admission directed to Plaintiff regarding Judy Rains, attached hereto as Attachment 42;

- Defendant's First Request for Admission directed to Plaintiff regarding Sherry Robinson, attached hereto as Attachment 43;

- Defendant's First Request for Admission directed to Plaintiff regarding Amanda Smith, attached hereto as Attachment 44.

Dated: June 27, 2012

Respectfully Submitted,

OGLETREE, DEAKINS, NASH, SMOAK & STEWART

/s/ Sarah N. Swatosh

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APPENDIX L

Defendant Mach Mining, LLC's First Request for Admission Directed to Plaintiff Vivian J. Beasley

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS BENTON DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	**Case No. 3:11-CV-879-JPG-PMF**
Plaintiff,	)	
v.	)	
Mach Mining, LLC,	)	
Defendant.	)	

DEFENDANT MACH MINING, LLC'S FIRST REQUEST FOR ADMISSION DIRECTED TO PLAINTIFF VIVIAN J. BEASLEY

Defendant Mach Mining, LLC, pursuant to Rule 36 of the Federal Rules of Civil Procedure, requires answers to the following Requests for Admission. If your answer to any of the following requests is anything other than an unqualified admission, please answer the accompanying interrogatory and request for production of documents.

DEFINITIONS AND INSTRUCTIONS

The following definitions and/or instructions are an integral part of these requests:

1. Each of the matters stated as Requests for Admissions herein will be deemed admitted unless answers are served within thirty (30) days after service of these Requests. If an objection is made to any Request, the reasons therefore should be stated with particularity. All answers shall specifically admit or deny the matter or set forth in details the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the Request; and when good faith requires that a party qualify its answer or deny only a part of the matter of which an admission is requested, it shall specify so much of it as is true and qualify or deny the remainder. An answering party may not assert lack of information or knowledge as a reason for failure to admit or deny a Request, unless it states that it has made reasonable inquiry and that the information known or readily obtainable by her is insufficient to enable it to admit or deny same. Such representations must, of course, be true.

2. *EEOC.* The term "EEOC" means the Equal Employment Opportunity Commission and all representatives, agents, and all persons acting on its behalf.

3. *Mach.* The term "Mach" means Mach Mining LLC, its affiliates, predecessors, present and former agents, employees, attorneys and representatives, and all other persons acting for or on behalf of Mach Mining.

4. *Letter of Determination.* The phrase "Letter of Determination" means the probable cause Determination made by EEOC, bates labeled at E000042-000043.

REQUESTS FOR ADMISSION

1. Admit that at no time after June 1, 2007, Vivian J. Beasley applied for a job with Mach.

2. Admit that as of September 17, 2010, EEOC had not determined that the "class of female applicants" (as referenced in the Letter of Determination) specifically included Vivian J. Beasley.

3. Admit that as of September 17, 2010, EEOC had not verbally communicated with Vivian J. Beasley.

4. Admit that as of September 17, 2010, EEOC had not exchanged written correspondence, including emails, faxes and/or any letters, with Vivian J. Beasley.

5. Admit that as of September 17, 2010, EEOC had not requested any documents from a third party identified by Vivian J. Beasley.

6. Admit that as of September 17, 2010, EEOC had not subpoenaed any documents from a third party identified by Vivian J. Beasley.

7. Admit that as of September 17, 2010, EEOC had not interviewed any witnesses identified by Vivian J. Beasley.

8. Admit that as of September 17, 2010, EEOC had not investigated whether Mach had specifically discriminated against Vivian J. Beasley based on her gender.

9. Admit that as of September 27, 2011, EEOC had not estimated damages in the form of back wages for Vivian J. Beasley.

10. Admit that as of September 27, 2011, EEOC had not disclosed Vivian J. Beasley's estimated back wages to Mach.

11. Admit that as of September 27, 2011, EEOC had not estimated damages in the form of front wages for Vivian J. Beasley.

12. Admit that as of September 27, 2011, EEOC had not disclosed Vivian J. Beasley's estimated front wages to Mach.

13. Admit that as of September 27, 2011, EEOC had not estimated damages in the form of lost benefits for Vivian J. Beasley.

14. Admit that as of September 27, 2011, EEOC had not disclosed Vivian J. Beasley's estimated lost benefits to Mach.

15. Admit that as of September 27, 2011, EEOC had not performed any damages calculation on behalf of Vivian J. Beasley.

16. Admit that as of September 27, 2011, EEOC had not disclosed Vivian J. Beasley's damages calculation to Mach.

Dated: June 27, 2012

Respectfully Submitted,

MACH MINING, LLC

/s/ Sarah N. Swatosh
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APPENDIX M

EEOC's Responses Requests for Admission

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS BENTON DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	**Case No. 3:11-CV-879-JPG-PMF**
Plaintiff,	
v.	
Mach Mining, LLC,	
Defendant.	

EEOC'S RESPONSES TO DEFENDANT MACH MINING, LLC'S REQUESTS FOR ADMISSION DIRECTED TO PLAINTIFF REGARDING EACH CLAIMANT

On May 16, 2012, Defendant mailed to EEOC forty-four sets of requests to admit facts. Forty-three of these were identical to each other except for the name of the claimant that was inserted into each set

of requests; each contained sixteen requests. A set was also served regarding the Charging Party; the eight requests in this set are identical to requests nine through sixteen of the other sets. In total, Defendant served 696 requests to admit facts on EEOC.

Many of the requests appear to deal with matters outside the knowledge of the Defendant. It therefore appears that Defendant is not using these requests to confirm matters that are already known, in an effort to streamline discovery and trial, but rather as a method for circumventing the limit placed on the number of interrogatories a party may propound. EEOC generally objects to these requests on that basis.

Other Requests ask EEOC to confirm information which has already been shown to be false through the production of documents. EEOC concludes from this that Defendant propounded these requests not in an attempt to clarify issues, but for some other purpose. EEOC objects to these requests as harassing.

1. Admit that at no time after June 1, 2007, [Claimant Name] applied for a job with Mach.

Response: During the administrative investigation, Defendant produced dated applications, cover letters, resumes, or lists of resumes that show that many of the claimants applied to Mach after June 1, 2007. EEOC therefore objects to this request as harassing.

Without waiving this objection, see EEOC's responses contained in Attachment A.

With respect to Andrea Bruington, Debbie Edwards, and Benita Jordan, EEOC lacks sufficient information to admit or deny that they did not apply to Mach after June 1, 2007. Mach has not produced applications for Jordan and Bruington, and the application from Edwards does contain any date stamp reflecting when it was received. In addition, based on the information EEOC has obtained from Bruington, Edwards, and Jordan as to when they applied at Mach, EEOC cannot determine with certainty whether they applied after June 1, 2007 and therefore can neither admit nor deny this request to admit.

2. Admit that as of September 17, 2010, EEOC had not determined that the "class of female applicants" (as referenced in the Letter of Determination) specifically included [Claimant Name].

Response: EEOC objects to Request to Admit 2 because it seeks information that is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence.

EEOC's administrative investigation is irrelevant and not reviewable, as Defendants are entitled to a trial de novo on all discrimination claims in this case. *See, e.g., EEOC v. Caterpillar, Inc.*, 409 F.3d 831, 833 (7th Cir. 2005); *EEOC v. Keco Indus., Inc.*, 748 F.2d 1097, 1100 (6th Cir. 1984);

EEOC v. Chicago Miniature Lamp Works, 526 F. Supp. 974, 976 (N. D. Ill. 1981).

EEOC further objects that Request to Admit 2 seeks information protected from disclosure by the government deliberative process privilege.

EEOC objects to this Request as an attempt to circumvent the limits placed on the number of interrogatories a party may propound.

3. Admit that as of September 17, 2010, EEOC had not verbally communicated with [Claimant Name].

Response: EEOC objects to Request to Admit 3 because it seeks information that is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. EEOC's administrative investigation is irrelevant and not reviewable, as Defendants are entitled to a trial de novo on all discrimination claims in this case. *See, e.g., EEOC v. Caterpillar, Inc.*, 409 F.3d 831, 833 (7th Cir. 2005); *EEOC v. Keco Indus., Inc.*, 748 F.2d 1097, 1100 (6th Cir. 1984); *EEOC v. Chicago Miniature Lamp Works*, 526 F. Supp. 974, 976 (N. D. Ill. 1981).

EEOC has previously produced documents showing that it verbally communicated with many of the claimants during its investigation. EEOC therefore objects to this request as harassing.

Without waiving these objections, see EEOC's responses contained in Attachment A.

4. Admit that as of September 17, 2010, EEOC had not exchanged written correspondence, including

emails, faxes and/or any letters with [Claimant Name].

Response: EEOC objects to Request to Admit 4 because it seeks information that is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. EEOC's administrative investigation is irrelevant and not reviewable, as Defendants are entitled to a trial de novo on all discrimination claims in this case. *See, e.g., EEOC v. Caterpillar, Inc.*, 409 F.3d 831, 833 (7th Cir. 2005); *EEOC v. Keco Indus., Inc.*, 748 F.2d 1097, 1100 (6th Cir. 1984); *EEOC v. Chicago Miniature Lamp Works*, 526 F. Supp. 974, 976 (N. D. Ill. 1981).

EEOC has previously produced documents showing that it communicated in writing with many of the claimants during its investigation. EEOC therefore objects to this request as harassing.

Without waiving these objections, see EEOC's responses contained in Attachment A.

5. Admit that as of September 17, 2010, EEOC had not requested any documents from a third party identified by [Claimant Name].

Response: EEOC objects to Request to Admit 5 because it seeks information that is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. EEOC's administrative investigation is irrelevant and not reviewable, as Defendants are entitled to a trial de novo on all discrimination claims in this case. *See, e.g., EEOC v. Caterpillar, Inc.*, 409 F.3d 831, 833 (7th Cir. 2005); *EEOC v. Keco Indus., Inc.*, 748 F.2d 1097, 1100 (6th

Cir. 1984); *EEOC v. Chicago Miniature Lamp Works*, 526 F. Supp. 974, 976 (N. D. Ill. 1981).

EEOC further objects that Request to Admit 5 is vague because "identified" is undefined, such that it is unclear whether "identified" includes an instance, for example, where a claimant referred to unnamed individuals with whom she conversed, or whether it is limited to instances where a claimant identified a third party by name. For purposes of this Request to Admit, EEOC will apply Definition 3 "Identify (with respect to persons)", contained in Defendant Mach Mining, LLC's First Interrogatories Directed to Plaintiff.

EEOC objects to Request to Admit 5 because it assumes without foundation that a claimant identified third parties from whom EEOC could request documents and is therefore misleading. EEOC also objects that Request to Admit 5 is vague and ambiguous because it is unclear whether EEOC is being asked to admit or deny both that a claimant identified third parties and that EEOC had not requested any documents from third parties.

Without waiving these objections, see EEOC's responses contained in Attachment A.

6. Admit that as of September 17, 2010, EEOC had not subpoenaed any documents from a third party identified by [Claimant Name].

Response: EEOC objects to Request to Admit 6 because it seeks information that is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. EEOC's administrative

investigation is irrelevant and not reviewable, as Defendants are entitled to a trial de novo on all discrimination claims in this case. *See, e.g., EEOC v. Caterpillar, Inc.*, 409 F.3d 831, 833 (7th Cir. 2005); *EEOC v. Keco Indus., Inc.*, 748 F.2d 1097, 1100 (6th Cir. 1984); *EEOC v. Chicago Miniature Lamp Works*, 526 F. Supp. 974, 976 (N. D. Ill. 1981).

EEOC further objects that Request to Admit 6 is vague because "identified" is undefined, such that it is unclear whether "identified" includes an instance, for example, where a claimant referred to unnamed individuals with whom she conversed, or whether it is limited to instances where a claimant identified a third party by name. For purposes of this Request to Admit, EEOC will apply Definition 3, "Identify (with respect to persons)," contained in Defendant Mach Mining, LLC's First Interrogatories Directed to Plaintiff.

EEOC objects to Request to Admit 6 because it assumes without foundation that a Claimant identified third parties from whom EEOC could subpoena documents and is therefore misleading. EEOC also objects that Request to Admit 6 is vague and ambiguous because it is unclear whether EEOC is being asked to admit or deny both that a claimant identified third parties and that EEOC had not subpoenaed any documents from third parties.

Without waiving these objections, see EEOC's responses contained in Attachment A.

7. Admit that as of September 17, 2010, EEOC had not interviewed any witnesses identified by [Claimant Name].

Response: EEOC objects to Request to Admit 7 because it seeks information that is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. EEOC's administrative investigation is irrelevant and not reviewable, as Defendants are entitled to a trial de novo on all discrimination claims in this case. *See, e.g., EEOC v. Caterpillar, Inc.*, 409 F.3d 831, 833 (7th Cir. 2005); *EEOC v. Keco Indus., Inc.*, 748 F.2d 1097, 1100 (6th Cir. 1984); *EEOC v. Chicago Miniature Lamp Works*, 526 F Supp. 974, 976 (N. D. Ill. 1981).

EEOC further objects that Request to Admit 7 is vague because "identified" is undefined, such that it is unclear whether "identified" includes an instance, for example, where a claimant referred to unnamed individuals with whom she conversed, or whether it is limited to instances where a claimant identified a third party by name. For purposes of this Request to Admit, EEOC will apply Definition 3, "Identify (with respect to persons)," contained in Defendant Mach Mining, LLC's First Interrogatories Directed to Plaintiff.

EEOC objects to Request to Admit 7 because it assumes without foundation that a claimant identified third parties from whom EEOC could interview therefore misleading. EEOC also objects that Request to Admit 7 is vague and ambiguous because it is unclear whether

EEOC is being asked to admit or deny both that a claimant identified third parties and that EEOC had not interviewed those third parties.

Without waiving these objections, see EEOC's responses contained in Attachment A.

8. Admit that as of September 17, 2010, EEOC had not investigated whether Mach had specifically discriminated against [Claimant Name] based on gender.

Response: EEOC objects to Request to Admit 8 because it seeks information that is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. EEOC's administrative investigation is irrelevant and not reviewable, as Defendants are entitled to a trial de novo on all discrimination claims in this case. *See, e.g., EEOC v. Caterpillar, Inc.*, 409 F.3d 831, 833 (7th Cir. 2005); *EEOC v. Keco Indus., Inc.*, 748 F.2d 1097, 1100 (6th Cir. 1984); *EEOC v. Chicago Miniature Lamp Works*, 526 F. Supp. 974, 976 (N. D. Ill. 1981).

EEOC has previously produced documents which demonstrate an investigation specifically in regard to many of the claimants during its investigation. EEOC therefore objects to this request as harassing.

Without waiving these objections, see EEOC's responses contained in Attachment A.

9. Admit that as of September 27, 2011, EEOC had not estimated damages in the form of back wages for [Claimant Name].

Response: EEOC objects that Request to Admit 9 because whether and when EEOC investigators, supervisors, or attorneys estimated back wages for any claimant is information protected from disclosure by the government deliberative process privilege, the attorney-client privilege, and/or the attorney work product privilege.

EEOC further objects to Request to Admit 9 because what was said or done during conciliation is irrelevant as Mach has not waived Title VII's confidentiality provision with respect to conciliation and therefore cannot rely on the conciliation proceedings as a basis for its defense. *See* 42 U.S.C. § 2000e-5(b); Plaintiff EEOC's Motion to Deem Confidentiality of Conciliation Process to Have Been Waived by Defendant. EEOC further objects to Request to Admit 9 as EEOC's conciliation efforts are beyond judicial review. *See EEOC v. Keco Indus., Inc.*, 748 F 2d 1097, 1102 (6th Cir. 1984) ("The district court should only determine whether the EEOC made an attempt at conciliation. The form and substance of those conciliations is within the discretion of the EEOC as the agency ... and is beyond judicial review."); *EEOC v. Zia Co.*, 582 F.2d 527, 533 (10th Cir. 1978) ("[A] court should not examine the details of the offers and counteroffers between the parties, nor impose its notions of what the government should provide ... "). Therefore, to the extent that Request to Admit 9 seeks to confirm facts about EEOC's assessment of potential damages for conciliation purposes, it is irrelevant and not

reasonably calculated to lead to the discovery or establishment of admissible facts.

EEOC objects to this Request as an attempt to circumvent the limits placed on the number of interrogatories a party may propound.

10. Admit that as of September 27, 2011, EEOC had not disclosed [Claimant Name]'s estimated back wages to Mach.

Response: EEOC objects to Request to Admit 10 because what was said or done during conciliation is irrelevant as Mach has not waived Title VII's confidentiality provision with respect to conciliation and therefore cannot rely on the conciliation proceedings as a basis for its defense. *See* 42 U.S.C. § 2000e-5(b); Plaintiff EEOC's Motion to Deem Confidentiality of Conciliation Process to Have Been Waived by Defendant. EEOC further objects to Request to Admit 10 as EEOC's conciliation efforts are beyond judicial review. *See EEOC v. Keco Indus., Inc.*, 748 F. 2d 1097, 1102 (6th Cir. 1984) ("The district court should only determine whether the EEOC made an attempt at conciliation. The form and substance of those conciliations is within the discretion of the EEOC as the agency ... and is beyond judicial review."); *EEOC v. Zia Co.*, 582 F.2d 527, 533 (10th Cir. 1978) ("[A] court should not examine the details of the offers and counteroffers between the parties, nor impose its notions of what the government should provide ... "). Therefore, to the extent that Request to Admit 10 seeks to confirm facts about EEOC's assessment of potential damages

for conciliation purposes, it is irrelevant and not reasonably calculated to lead to the discovery or establishment of admissible facts.

EEOC objects to Request to Admit 10 because it assumes without foundation that EEOC estimated back wages for the claimant and is therefore misleading.

Without waiving these objections, see EEOC's responses contained in Attachment A.

11. Admit that as of September 27, 2011, EEOC had not estimated damages in the form of front wages for [Claimant Name].

Response: EEOC objects that Request to Admit 11 because whether and when EEOC investigators, supervisors, or attorneys estimated back wages for any claimant is information protected from disclosure by the government deliberative process privilege, the attorney-client privilege, and/or the attorney work product privilege.

EEOC further objects to Request to Admit 11 because what was said or done during conciliation is irrelevant as Mach has not waived Title VII's confidentiality provision with respect to conciliation and therefore cannot rely on the conciliation proceedings as a basis for its defense. *See* 42 U.S.C. § 2000e-5(b); Plaintiff EEOC's Motion to Deem Confidentiality of Conciliation Process to Have Been Waived by Defendant. EEOC further objects to Request to Admit 11 as EEOC's conciliation efforts are beyond judicial review. *See EEOC v. Keco Indus., Inc.*, 748 F. 2d 1097, 1102 (6th Cir. 1984) ("The

district court should only determine whether the EEOC made an attempt at conciliation. The form and substance of those conciliations is within the discretion of the EEOC as the agency ... and is beyond judicial review."); *EEOC v. Zia Co.*, 582 F.2d 527, 533 (10th Cir. 1978) ("[A] court should not examine the details of the offers and counteroffers between the parties, nor impose its notions of what the government should provide ... "). Therefore, to the extent that Request to Admit 11 seeks to confirm facts about EEOC's assessment of potential damages for conciliation purposes, it is irrelevant and not reasonably calculated to lead to the discovery or establishment of admissible facts.

EEOC objects to this Request as an attempt to circumvent the limits placed on the number of interrogatories a party may propound.

12. Admit that as of September 27, 2011, EEOC had not disclosed [Claimant Name]'s estimated front wages to Mach.

Response: EEOC objects to Request to Admit 12 because what was said or done during conciliation is irrelevant as Mach has not waived Title VII's confidentiality provision with respect to conciliation and therefore cannot rely on the conciliation proceedings as a basis for its defense. *See* 42 U.S.C. § 2000e-5(b); Plaintiff EEOC's Motion to Deem Confidentiality of Conciliation Process to Have Been Waived by Defendant. EEOC further objects to Request to Admit 12 as EEOC's conciliation efforts are beyond judicial review. *See EEOC v. Keco Indus.*,

Inc., 748 F. 2d 1097, 1102 (6th Cir. 1984) ("The district court should only determine whether the EEOC made an attempt at conciliation. The form and substance of those conciliations is within the discretion of the EEOC as the agency ... and is beyond judicial review."); *EEOC v. Zia Co.*, 582 F.2d 527, 533 (10th Cir. 1978) ("[A] court should not examine the details of the offers and counteroffers between the parties, nor impose its notions of what the government should provide ... "). Therefore, to the extent that Request to Admit 12 seeks to confirm facts about EEOC's assessment of potential damages for conciliation purposes, it is irrelevant and not reasonably calculated to lead to the discovery or establishment of admissible facts.

EEOC objects to Request to Admit 12 because it assumes without foundation that EEOC estimated front wages for the claimant and is therefore misleading.

Without waiving these objections, see EEOC's responses contained in Attachment A.

13. Admit that as of September 27, 2011, EEOC had not estimated damages in the form of lost benefits for [Claimant Name].

Response: EEOC objects that Request to Admit 13 because whether and when EEOC investigators, supervisors, or attorneys estimated back wages for any claimant is information protected from disclosure by the government deliberative process privilege, the attorney-client privilege, and/or the attorney work product privilege.

EEOC further objects to Request to Admit 13 because what was said or done during conciliation is irrelevant as Mach has not waived Title VII's confidentiality provision with respect to conciliation and therefore cannot rely on the conciliation proceedings as a basis for its defense. *See* 42 U.S.C. § 2000e-5(b); Plaintiff EEOC's Motion to Deem Confidentiality of Conciliation Process to Have Been Waived by Defendant. EEOC further objects to Request to Admit 13 as EEOC's conciliation efforts are beyond judicial review. *See EEOC v. Keco Indus., Inc.*, 748 F. 2d 1097, 1102 (6th Cir. 1984) ("The district court should only determine whether the EEOC made an attempt at conciliation. The form and substance of those conciliations is within the discretion of the EEOC as the agency ... and is beyond judicial review."); *EEOC v. Zia Co.*, 582 F.2d 527, 533 (10th Cir. 1978) ("[A] court should not examine the details of the offers and counteroffers between the parties, nor impose its notions of what the government should provide ... "). Therefore, to the extent that Request to Admit 13 seeks to confirm facts about EEOC's assessment of potential damages for conciliation purposes, it is irrelevant and not reasonably calculated to lead to the discovery or establishment of admissible facts.

EEOC objects to this Request as an attempt to circumvent the limits placed on the number of interrogatories a party may propound.

14. Admit that as of September 27, 2011, EEOC had not disclosed [Claimant Name]'s estimated lost benefits to Mach.

Response: EEOC objects to Request to Admit 14 because what was said or done during conciliation is irrelevant as Mach has not waived Title VII's confidentiality provision with respect to conciliation and therefore cannot rely on the conciliation proceedings as a basis for its defense. *See* 42 U.S.C. § 2000e-5(b); Plaintiff EEOC's Motion to Deem Confidentiality of Conciliation Process to Have Been Waived by Defendant. EEOC further objects to Request to Admit 14 as EEOC's conciliation efforts are beyond judicial review. *See EEOC v. Keco Indus., Inc.*, 748 F. 2d 1097, 1102 (6th Cir. 1984) ("The district court should only determine whether the EEOC made an attempt at conciliation. The form and substance of those conciliations is within the discretion of the EEOC as the agency ... and is beyond judicial review."); *EEOC v. Zia Co.*, 582 F.2d 527, 533 (10th Cir. 1978) ("[A] court should not examine the details of the offers and counteroffers between the parties, nor impose its notions of what the government should provide ... "). Therefore, to the extent that Request to Admit 14 seeks to confirm facts about EEOC's assessment of potential damages for conciliation purposes, it is irrelevant and not reasonably calculated to lead to the discovery or establishment of admissible facts.

EEOC objects to Request to Admit 14 because it assumes without foundation that EEOC estimated

lost benefits for the claimant and is therefore misleading.

Without waiving these objections, see EEOC's responses contained in Attachment A.

15. Admit that as of September 27, 2011, EEOC had not performed any damages calculation on behalf of [Claimant Name].

Response: EEOC objects that Request to Admit 15 because whether and when EEOC investigators, supervisors, or attorneys estimated back wages for any claimant is information protected from disclosure by the government deliberative process privilege, the attorney-client privilege, and/or the attorney work product privilege.

EEOC further objects to Request to Admit 15 because what was said or done during conciliation is irrelevant as Mach has not waived Title VII's confidentiality provision with respect to conciliation and therefore cannot rely on the conciliation proceedings as a basis for its defense. *See* 42 U.S.C. § 2000e-5(b); Plaintiff EEOC's Motion to Deem Confidentiality of Conciliation Process to Have Been Waived by Defendant. EEOC further objects to Request to Admit 15 as EEOC's conciliation efforts are beyond judicial review. *See EEOC v. Keco Indus., Inc.*, 748 F. 2d 1097, 1102 (6th Cir. 1984) ("The district court should only determine whether the EEOC made an attempt at conciliation. The form and substance of those conciliations is within the discretion of the EEOC as the agency ... and is beyond judicial review."); *EEOC v. Zia Co.*, 582 F.2d

527, 533 (10th Cir. 1978) ("[A] court should not examine the details of the offers and counteroffers between the parties, nor impose its notions of what the government should provide ... "). Therefore, to the extent that Request to Admit 15 seeks to confirm facts about EEOC's assessment of potential damages for conciliation purposes, it is irrelevant and not reasonably calculated to lead to the discovery or establishment of admissible facts.

EEOC objects to this Request as an attempt to circumvent the limits placed on the number of interrogatories a party may propound.

16. Admit that as of September 27, 2011, EEOC had not disclosed [Claimant Name]'s damages calculation to Mach.

Response: EEOC objects to Request to Admit 16 because what was said or done during conciliation is irrelevant as Mach has not waived Title VII's confidentiality provision with respect to conciliation and therefore cannot rely on the conciliation proceedings as a basis for its defense. *See* 42 U.S.C. § 2000e-5(b); Plaintiff EEOC's Motion to Deem Confidentiality of Conciliation Process to Have Been Waived by Defendant. EEOC further objects to Request to Admit 16 as EEOC's conciliation efforts are beyond judicial review. *See EEOC v. Keco Indus., Inc.*, 748 F. 2d 1097, 1102 (6th Cir. 1984) ("The district court should only determine whether the EEOC made an attempt at conciliation. The form and substance of those conciliations is within the discretion of the EEOC as the agency ... and is

beyond judicial review."); *EEOC v. Zia Co.*, 582 F.2d 527, 533 (10th Cir. 1978) ("[A] court should not examine the details of the offers and counteroffers between the parties, nor impose its notions of what the government should provide ... "). Therefore, to the extent that Request to Admit 16 seeks to confirm facts about EEOC's assessment of potential damages for conciliation purposes, it is irrelevant and not reasonably calculated to lead to the discovery or establishment of admissible facts.

EEOC objects to Request to Admit 16 because it assumes without foundation that EEOC estimated damages for the claimant and is therefore misleading.

Without waiving these objections, see EEOC's responses contained in Attachment A.

Dated: June 18, 2012

Respectfully Submitted,

/s/ Ann M. Henry

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Attachment A--EEOC's Responses to Defendant Mach Mining, LLC's Requests for Admission Directed to EEOC Regarding Each Claimant

Claimant	RTA 1	RTA 2	RTA 3	RTA 4	RTA 5	RTA 6	RTA 7	RTA 8
Jordan, Benita	Insufficient information to admit or deny after making a reasonable inquiry	See objections	Admit	Admit	Admit	Admit	Admit	Deny
Kilman, Elizabeth	Deny	See objections	Admit	Admit	Admit	Admit	Admit	Deny
Laskowski, Christina	Admit	See objections	Deny	Deny	Admit	Admit	Admit	Deny
Massa, Jenna	Deny	See objections	Admit	Admit	Admit	Admit	Admit	Deny
Meracle, Arleen	Admit	See objections	Admit	Admit	Admit	Admit	Admit	Deny
Paglial, Sandra	Admit	See objections	Admit	Admit	Admit	Admit	Admit	Deny
Petkas, Brooke	See objections to RTA 9	Admit	See objections to RTA 11	Admit	See objections to RTA 13	Admit	See objections to RTA 15	Deny
Pritchett, Amy	Deny	See objections	Deny	Admit	Admit	Admit	Admit	Deny
Pyle, Paula	Admit	See objections	Deny	Deny	Admit	Admit	Admit	Deny
Rains, Judy	Admit	See objections	Admit	Deny	Admit	Admit	Admit	Deny
Resor, Debbie	Admit	See objections	Deny	Admit	Admit	Admit	Admit	Deny
Robinson, Sherry	Deny	See objections	Deny	Deny	Admit	Admit	Admit	Deny
Rolla, Lesli	Deny	See objections	Admit	Admit	Admit	Admit	Admit	Deny
Sanders, Dawn	Deny	See objections	Admit	Admit	Admit	Admit	Admit	Admit
Shaw, Donnita	Deny	See objections	Admit	Deny	Admit	Admit	Admit	Deny
Smith, Amanda	Deny	See objections	Deny	Admit	Admit	Admit	Admit	Deny
Smith, Bobbi Jo	Deny	See objections	Admit	Deny	Admit	Admit	Admit	Deny
Tarr, Christi	Deny	See objections	Admit	Deny	Admit	Admit	Admit	Deny
Threet, Julie	Deny	See objections	Admit	Deny	Admit	Admit	Admit	Deny
Vancil, Janice	Deny	See objections	Deny	Deny	Admit	Admit	Admit	Deny
Webb, Dana	Deny	See objections	Admit	Deny	Admit	Admit	Admit	Deny
Wolfe-Starnes, Kathi	Admit	See objections	Admit	Admit	Admit	Admit	Admit	Deny
Yates, Delana	Deny	See objections	Deny	Deny	Admit	Admit	Admit	Deny

Attachment A--EEOC's Responses to Defendant Mach Mining, LLC's Requests for Admission Directed to EEOC Regarding Each Claimant

Claimant	RTA 9	RTA 10	RTA 11	RTA 12	RTA 13	RTA 14	RTA 15	RTA 16
Beasley, Vivian	See objections	Admit	See objections	Admit	See objections	Admit	See objections	Admit
Beavers, Dixie	See objections	Admit	See objections	Admit	See objections	Admit	See objections	Admit
Blades, Susan	See objections	Admit	See objections	Admit	See objections	Admit	See objections	Admit
Bozarth, Carla	See objections	Admit	See objections	Admit	See objections	Admit	See objections	Admit
Brooks, Holly	See objections	Admit	See objections	Admit	See objections	Admit	See objections	Admit
Brulngton, Andrea	See objections	Admit	See objections	Admit	See objections	Admit	See objections	Admit
Carney, Kathryn	See objections	Admit	See objections	Admit	See objections	Admit	See objections	Admit
Carter, Julie	See objections	Admit	See objections	Admit	See objections	Admit	See objections	Admit
Clark, Heather	See objections	Admit	See objections	Admit	See objections	Admit	See objections	Admit
Cox, Carrie	See objections	Admit	See objections	Admit	See objections	Admit	See objections	Admit
DalMonte, Wendy	See objections	Admit	See objections	Admit	See objections	Admit	See objections	Admit
Davis, Amanda	See objections	Admit	See objections	Admit	See objections	Admit	See objections	Admit
Edwards, Debbie	See objections	Admit	See objections	Admit	See objections	Admit	See objections	Admit
Finney, Sandra	See objections	Admit	See objections	Admit	See objections	Admit	See objections	Admit
Geri, Karen	See objections	Admit	See objections	Admit	See objections	Admit	See objections	Admit
Grimsley-Bynum, Pamala	See objections	Admit	See objections	Admit	See objections	Admit	See objections	Admit
Hall-Seagraves, Kimberly	See objections	Admit	See objections	Admit	See objections	Admit	See objections	Admit
Harris, Jacquelynn	See objections	Admit	See objections	Admit	See objections	Admit	See objections	Admit
Herron, Tonya	See objections	Admit	See objections	Admit	See objections	Admit	See objections	Admit
Hitt, Kitty	See objections	Admit	See objections	Admit	See objections	Admit	See objections	Admit
Johnson, Carrie	See objections	Admit	See objections	Admit	See objections	Admit	See objections	Admit

Attachment A–EEOC's Responses to Defendant Mach Mining, LLC's Requests for Admission Directed to EEOC Regarding Each Claimant

Claimant	RTA 9	RTA 10	RTA 11	RTA 12	RTA 13	RTA 14	RTA 15	RTA 16
Jordan, Benita	See objections	Admit	See objections	Admit	See objections	Admit	See objections	Admit
Kliman, Elizabeth	See objections	Admit	See objections	Admit	See objections	Admit	See objections	Admit
Laskowski, Christina	See objections	Admit	See objections	Admit	See objections	Admit	See objections	Admit
Massa, Jenna	See objections	Admit	See objections	Admit	See objections	Admit	See objections	Admit
Meracle, Arleen	See objections	Admit	See objections	Admit	See objections	Admit	See objections	Admit
Pagilal, Sandra	See objections	Admit	See objections	Admit	See objections	Admit	See objections	Admit
Petkas, Brooke	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Pritchett, Amy	See objections	Admit	See objections	Admit	See objections	Admit	See objections	Admit
Pyle, Paula	See objections	Admit	See objections	Admit	See objections	Admit	See objections	Admit
Rains, Judy	See objections	Admit	See objections	Admit	See objections	Admit	See objections	Admit
Rasor, Debbie	See objections	Admit	See objections	Admit	See objections	Admit	See objections	Admit
Robinson, Sherry	See objections	Admit	See objections	Admit	See objections	Admit	See objections	Admit
Rolle, Lesli	See objections	Admit	See objections	Admit	See objections	Admit	See objections	Admit
Sanders, Dawn	See objections	Admit	See objections	Admit	See objections	Admit	See objections	Admit
Shaw, Donnita	See objections	Admit	See objections	Admit	See objections	Admit	See objections	Admit
Smith, Amanda	See objections	Admit	See objections	Admit	See objections	Admit	See objections	Admit
Smith, Bobbi Jo	See objections	Admit	See objections	Admit	See objections	Admit	See objections	Admit
Tarr, Christi	See objections	Admit	See objections	Admit	See objections	Admit	See objections	Admit
Threet, Julie	See objections	Admit	See objections	Admit	See objections	Admit	See objections	Admit
Vancil, Janice	See objections	Admit	See objections	Admit	See objections	Admit	See objections	Admit
Webb, Dana	See objections	Admit	See objections	Admit	See objections	Admit	See objections	Admit
Wolfe-Starnes, Kathi	See objections	Admit	See objections	Admit	See objections	Admit	See objections	Admit
Yates, Delana	See objections	Admit	See objections	Admit	See objections	Admit	See objections	Admit

APPENDIX N

Notice of Withdrawal of EEOC's First Requests to Admit Facts

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS BENTON DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	**Case No. 3:11-CV-879-JPG-PMF**
Plaintiff,	)	
v.	)	
Mach Mining, LLC,	)	
Defendant.	)	

NOTICE OF WITHDRAWAL OF EEOC'S FIRST REQUESTS TO ADMIT FACTS AND MODIFICATION OF ITS INTERROGATORIES AND DOCUMENT REQUESTS

EEOC withdraws its First Set of Requests for Admissions to Defendant Mach Mining, LLC, of which all of the requests related to EEOC's

investigation or conciliation of the charge of discrimination underlying this suit.

In addition, to the extent that EEOC's First Set of Interrogatories to Defendant (served on August 16, 2012) or First or Second Requests for Production of Documents call for the production of information or documents related to pre-suit conciliation efforts, EEOC agrees to limit those requests to seek only information or documents unrelated to conciliation and withdraws all portions of the requests seeking the production of information or documents related to conciliation.

Respectfully Submitted,

/s/ Ann M. Henry

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APPENDIX O

EEOC Letter Sep. 13, 2012

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
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September 13, 2012

R. Lance Witcher
Sarah Swatosh
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
7700 Bonhomme Ave
Suite 650
St. Louis, MO 63105

Re: *EEOC v. Mach Mining,* 11-879-JPG/PMFF

Lance:

Based on your representations in court on Monday, as well as conversations you had with EEOC counsel during breaks and after court, EEOC is concerned that you may intend to submit conciliation materials with your brief in response to our motion for partial summary judgment.

Title VII provides that nothing said or done in conciliation shall be "used as evidence in a subsequent proceeding without the written consent of the persons concerned." In this case none of the "persons concerned" have given their written consent, not Mach, the EEOC nor Brooke Petkas. You yourself have pointed out that in another case (*EEOC v. Lifecare,* 2009 WL 772834 (W.D.Pa.)) a judge recused himself because he had been exposed to conciliation materials. While it may not be clear that Title VII's criminal sanctions apply to "any person" including non-EEOC employees (though they may), EEOC's view is that it would certainly be sanctionable for you to inject prohibited documents into the proceedings. This is especially true as EEOC's motion rests on a purely legal matter – whether courts have the authority to scrutinize the content or methods of EEOC's conciliation efforts.

Based on discussions with you, it appeared to EEOC that you believe Title VII's prohibition on the use of conciliation materials is imposed solely on the EEOC. This interpretation is both strained and contrary to case law. Two appellate circuits, two district courts within the Seventh Circuit and other district courts outside the circuit have all held that the bar applies to *any* party. *See, e.g., Joseph v. Publix Supermarkets,* 2005 WL 2249887 at **8 (C.A.11 (Fla.)); *Olitsky v. Spencer Gifts, Inc.,* 842 F.2d 123, 126 (5th Cir.1988); *EEOC v. Scrub, Inc.,* No. 09 C 4228, 2010 WL 2136807, at *6 (N.D. Ill. May 25, 2010); *EEOC v. Olsten Staffing,* 627 F. Supp. 2d 972, 975-976 (W.D. Wis. 2009); *EEOC v.*

Hotspur Resorts Nevada, Ltd., No. 2:10–cv–02265, 2012 WL 2415541, at *5 (D. Nev. June 26, 2012); *EEOC v. Con-Way Freight*, 2008 WL 4066424 at *5 (E.D.Mo.).

You also conveyed your belief to EEOC that *EEOC v. Associated Dry Goods*, 449 U.S. 590 (1981) supported your view that Mach is free to use the conciliation materials in this case. *Associated Dry Goods* merely held that disclosure of certain information to the Charging Party was not a disclosure to the public in violation of §706 of Title VII. Charges and information obtained during an investigation are different than conciliation. Charges and facts learned during an investigation may be made public once the EEOC has commenced an action in court, while conciliation materials explicitly may not be used in any subsequent proceeding. In fact, at note 13 the Court stated that, "The statute also forbids public disclosure of any matters arising in informal conciliation 'without the written consent of the persons concerned...'" and goes on to note that this provision supports the notion that the *parties* are not the public. *Id.* at 598. The Defendant is not the only party to this action, and the Supreme Court has held that conciliation may not be made public without the consent of the persons concerned. Again, none of the persons concerned in this case have given their consent.

Please write by the close of business on Friday, September 21, 2012 to confirm that you do not intend to submit evidence of anything that was said or done

during conciliation with your response to EEOC's motion for partial summary judgment. If you do not so confirm, EEOC will likely be forced to file a motion for a protective order on this matter, thus incurring unnecessary expense and possibly further delaying this litigation. In that event, EEOC would have to consider seeking sanctions against you personally pursuant to 28 U.S.C.A. § 1927.

To be clear: if you file any conciliation material with your responsive brief without the written consent of EEOC and Brooke Petkas, or prior approval of the court, EEOC will likely seek sanctions against you and your client.

Please contact us if you wish to discuss this matter further. I look forward to hearing from you.

Sincerely,

s/ Ethan M. M. Cohen

Ethan M. M. Cohen

Trial Attorney

PETITIONER'S BRIEF

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
SEP 4 - 2014
SUPREME COURT CLERK

No. 13-1019

IN THE

Supreme Court of the United States

MACH MINING, LLC,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

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QUESTION PRESENTED

Whether and to what extent may a court enforce the Equal Employment Opportunity Commission's duty under 42 U.S.C. § 2000e-5(b), (f)(1) to conciliate discrimination claims before filing suit.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of this Court's Rules, petitioner states that the parent corporation of Mach Mining, LLC is Coal Field Transports, Inc. There are no publicly held companies that own more than 10 percent of Mach Mining, LLC's stock.

TABLE OF CONTENTS

QUESTION PRESENTED i

RULE 29.6 CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES v

BRIEF FOR THE PETITIONER 1

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 3

I. Statutory Background 3

II. Procedural History 5

SUMMARY OF ARGUMENT 9

ARGUMENT 12

I. The EEOC's Compliance With The Conciliation Precondition Is Subject To Judicial Review. 13

A. The Plain Text Of Title VII Makes Conciliation A Mandatory Condition Precedent To The Commission's Power To Bring Suit. 13

B. Failure To Comply With A Condition Precedent To Suit Is Subject To Judicial Review And Remedy. 17

II. The Seventh Circuit Identified No Valid Basis For Exempting The Conciliation Precondition From Judicial Enforcement. 23

A. Courts Should Not Conclude That Preconditions To Litigation Are Precatory Unless Congress Unambiguously So Provides....23

B. Giving The EEOC Discretion To Decide The Substance Of An Acceptable Conciliation Agreement Does Not Indicate That Congress Intended To Preclude Judicial Enforcement Of The Non-Discretionary Duty To Conciliate Before Resorting To Litigation. 24

C. The Statute's Confidentiality Provision Does Not Preclude Enforcement Of The Conciliation Mandate. 26

D. The Conciliation Requirement Is Susceptible To Neutral Judicial Enforcement....33

1. The EEOC Is Empowered To Issue Regulations Defining The Conciliation Obligation....33

2. Experience Demonstrates That Conciliation Requirements, Including Title VII's, Are Susceptible To Judicial Enforcement. 35

E. Judicial Review Does Not Undermine Conciliation. 43

CONCLUSION....51

TABLE OF AUTHORITIES

Cases

Alexander v. Gardner-Denver Co.,
415 U.S. 36 (1974) 3, 15

Baldwin Cnty. Welcome Ctr. v. Brown,
466 U.S. 147 (1984) 18, 20

BG Grp., PLC v. Republic of Argentina,
134 S. Ct. 1198 (2014) 36

Bowen v. Mich. Acad. of Family Physicians,
476 U.S. 667 (1986) 17, 23, 46

Branch v. Phillips Petroleum Co.,
638 F.2d 873 (5th Cir. 1981) 29

Burnett v. Grattan,
468 U.S. 42 (1984) 16

Canavan v. Beneficial Fin. Corp.,
553 F.2d 860 (3rd Cir. 1977) 28

Dent v. St. Louis-San Francisco Ry. Co.,
406 F.2d 399 (5th Cir. 1969), *cert. denied*, 403
U.S. 912 (1969) 29

EEOC v. Agro Distr., LLC,
555 F.3d 462 (5th Cir. 2009) 40, 45

EEOC v. Am. Nat. Bank,
652 F.2d 1176 (4th Cir. 1981) 37

EEOC v. Asplundh Tree Expert Co.,
340 F.3d 1256 (11th Cir. 2003) 40, 48

EEOC v. Associated Dry Goods Corp.,
449 U.S. 590 (1981) 15, 16, 27, 38

EEOC v. Klingler Elec. Corp.,
636 F.2d 104 (5th Cir. 1981) 38, 39

EEOC v. Peoplemark, Inc.,
732 F.3d 584 (6th Cir. 2013) 45

EEOC v. Pet, Inc.,
612 F.2d 1001 (5th Cir. 1980) 32

EEOC v. Philip Servs. Corp.,
635 F.3d 164 (5th Cir. 2011) 27

EEOC v. Propak Logistics, Inc.,
746 F.3d 145 (4th Cir. 2014) 45

EEOC v. Sears, Roebuck & Co.,
650 F.2d 14 (2nd Cir. 1981) 38

EEOC v. Sears, Roebuck & Co.,
No. 79 Civ. 5708 (KTD), 1980 WL 180
(S.D.N.Y. June 16, 1980), *aff'd*, 650 F.2d 14
(2nd Cir. 1981) 32

EEOC v. Shell Oil Co.,
466 U.S. 54 (1984) ..... passim

EEOC v. Trans States Airlines,
462 F.3d 987 (8th Cir. 2006) 40

EEOC v. Tricore Reference Labs.,
493 Fed. App'x. 955 (10th Cir. 2012) 45

Fed. Express Corp. v. Holowecki,
552 U.S. 389 (2008) 34

Ford Motor Co. v. EEOC,
458 U.S. 219 (1982) 12, 13, 49

Gladstone Realtors v. Bellwood,
441 U.S. 91 (1979) 16

Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.,
332 F.3d 976 (6th Cir. 2003) 32

Hallstrom v. Tillamook Cnty,
493 U.S. 20 (1989) 20, 21, 43

Hill v. W. Elec. Co., Inc.,
672 F.2d 381 (4th Cir. 1982) 38

John Wiley & Sons, Inc. v. Livingston,
376 U.S. 543 (1964) 36

Johnson v. Seaboard Air Line R.R. Co.,
405 F.2d 645 (4th Cir. 1968), *cert. denied*, 394
U.S. 918 (1969) 29

Jones v. Bock,
549 U.S. 199 (2007) 21, 22

JPD, Inc. v. Chronimed Holdings, Inc.,
539 F.3d 388 (6th Cir. 2008) 36

Kelley v. Sec., U.S. Dep't Hous. & Urban Dev.,
3 F.3d 951 (6th Cir. 1993) 32

Litton Fin. Printing Div. v. NLRB,
501 U.S. 190 (1991) 36

Love v. Pullman Co.,
404 U.S. 522 (1972) 33

Lumbermens Mut. Cas. Co. v. Broadspire Mgmt.
Servs., Inc.,
623 F.3d 476 (7th Cir. 2010) 36

Marshall v. Sun Oil Co.,
605 F.2d 1331 (5th Cir. 1979) 38, 39

McDonnell Douglas Corp. v. Green,
411 U.S. 792 (1973) 18

Mitchell v. United States,
526 U.S. 314 (1999) 31

Mohasco Corp. v. Silver,
447 U.S. 807 (1980) 23

Montes v. Vail Clinic, Inc.,
497 F.3d 1160 (10th Cir. 2007) 21

Myers v. Cent. Fla. Invs., Inc.,
592 F.3d 1201 (11th Cir. 2010) 22

Nat'l Cable & Telecom. Ass'n. v. Brand X Internet Servs.,
545 U.S. 967 (2005) 42

Nat'l R.R. Passenger Corp. v. Morgan,
536 U.S. 101 (2002) 14, 18

Occidental Life Ins. Co. v. EEOC,
432 U.S. 355 (1977) ..... passim

Patterson v. McLean Credit Union,
491 U.S. 164 (1989) 15, 25, 37

Reed Elsevier, Inc. v. Muchnick,
559 U.S. 154 (2010) 21

Traynor v. Turnage,
485 U.S. 535 (1988) 17, 23

United Air Lines, Inc. v. Evans,
431 U.S. 553 (1977) 18

United States v. Felt & Tarrant Mfg. Co.,
283 U.S. 269 (1931) 21

United States v. Zucca,
351 U.S. 91 (1956) 21

Univ. of Tex. Sw. Med. Ctr. v. Nassar,
133 S. Ct. 2517 (2013) 17

Wester v. Doe,
486 U.S. 592 (1988) 41

Willy v. Admin. Review Bd.,
423 F.3d 483 (5th Cir. 2005) 31

Zipes v. Trans World Airlines, Inc.,
455 U.S. 385 (1982) 18

Statutes

7 U.S.C. § 2276(b)(2) 28
10 U.S.C. § 613a 28
13 U.S.C. § 9(a) 28
15 U.S.C. § 281a 28
17 U.S.C. § 411(a) 21
17 U.S.C. § 501(a) 21
28 U.S.C. § 1254(1) 1
28 U.S.C. § 1292(b) 7
29 U.S.C. § 158(a)(5) 36
29 U.S.C. § 158(d) 36
42 U.S.C. § 10708(b) 28
42 U.S.C. § 1997e(a) 21
42 U.S.C. § 2000e-2 3
42 U.S.C. § 2000e-5(b) ..... passim
42 U.S.C. § 2000e-5(f)(1) ..... passim
42 U.S.C. § 2000e-9 14
42 U.S.C. § 2000e-12(a) 34
42 U.S.C. § 3610(d)(1) 33
42 U.S.C. § 3789g(a) 27
42 U.S.C. § 6972(b)(1) 20
Civil Rights Act of 1964,
Pub. L. No. 88-352, § 706(a), 78 Stat. 241, 259 28

Rules

29 C.F.R. § 1601.9 34
29 C.F.R. § 1601.12 34
29 C.F.R. § 1601.14 34
29 C.F.R. § 1601.24 35

29 C.F.R. § 1601.28 34
29 C.F.R. §§ 1601.15-.17 34
29 C.F.R. §§ 1601.18-.21 34
Fed. R. Civ. P. 9(c) 22, 30
Fed. R. Evid. 408 ..... 28, 29
Fed. R. Evid. 502(a) 31

Other Authorities

110 Cong. Rec. 8193 (1964) (Sen. Dirksen) 18
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EEOC, Resolving a Charge, http://www.eeoc.gov/employers/resolving.cfm 47
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INT'L BAR ASS'N, IBA GUIDELINES FOR DRAFTING INTERNATIONAL ARBITRATION CLAUSES (2010).....41

Press Release, ACH Mining Sued by EEOC for Sex Discrimination: Federal Agency Asserts That Coal Mine's Failure to Hire Qualified Female Applicants Violated Civil Rights Law (Sept. 27, 2011).....7, 55

Press Release, EEOC Issues Comprehensive Litigation Report (Aug. 13, 2002).....51

BRIEF FOR THE PETITIONER

Petitioner Mach Mining, LLC, respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (Pet. App. 1a) is published at 738 F.3d 171. The district court's decisions dated January 28, 2013 (Pet. App. 31a-41a) and May 20, 2013 (Pet. App. 42a-55a) are unpublished.

JURISDICTION

The court of appeals entered its judgment on December 20, 2013. Pet. App. 1a. Petitioner filed a timely petition for a writ of certiorari on February 25, 2014, which this Court granted on June 30, 2014. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 2000e-5(b) of Title 42 provides in relevant part:

> Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer (hereinafter referred to as the

> "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission.... If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both.

Section 2000e-5(f)(1) of Title 42 provides in relevant part:

> If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government,

governmental agency, or political subdivision named in the charge. . .

STATEMENT OF THE CASE

Title VII of the Civil Rights Act of 1964 prohibits the Equal Employment Opportunity Commission (EEOC) from suing an employer unless the Commission first has been unable to secure a conciliation agreement with the employer. 42 U.S.C. § 2000e-5(f)(1). Breaking with thirty years of uniform circuit precedent, the Seventh Circuit held that this precondition to suit is unenforceable.

I. Statutory Background

Title VII prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2. While Congress has authorized individuals and the Equal Employment Opportunity Commission to bring suits to enforce the statute when certain conditions are met, "[c]ooperation and voluntary compliance were selected as the preferred means for achieving th[e] goal" of equal employment opportunity. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). Toward that end, "Congress established an integrated, multistep enforcement procedure culminating in the EEOC's authority to bring a civil action in a federal court." *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 359 (1977).

First, a charge of discrimination must be "filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission" alleging an "unlawful employment practice." 42 U.S.C. § 2000e-5(b).

Second, upon receipt of the charge, the Commission "shall serve a notice of the charge on such employer" and "shall make an investigation thereof." *Id.*

Third, "[i]f the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission *shall* endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." *Id.* (emphasis added).[1] "Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned." *Id.* During the conciliation process, the Commission has "the responsibility of settling disputes, if possible, in an informal, noncoercive fashion." *Occidental*, 432 U.S. at 367-68.

Fourth, only if "the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission" may the Commission file suit. 42 U.S.C. § 2000e-5(f)(1).[2]

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[1] By contrast, "[i]f the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action." 42 U.S.C. § 2000e-5(b). An individual complainant may then file her own civil action. *Id.* § 2000e-5(f)(1).

[2] If the respondent is a governmental entity, the Commission is required to refer the case to the Attorney General for litigation. 42 U.S.C. § 2000e-5(f)(1).

II. Procedural History

1. In early 2008, a single complainant filed a charge of discrimination with the EEOC, alleging that petitioner, a coal mining company, had denied the complainant employment as a coal miner because of her sex. Pet. App. 3a. The Commission issued a determination that there was reasonable cause to believe petitioner had "discriminated against [the] Charging Party and a class of female applicants, because of their sex, in that [petitioner] failed to recruit and hire them, in violation of Title VII." J.A. 15. Other than stating that the finding was based on "the evidence obtained during the course of the investigation," the determination contained no information regarding the basis of the finding. *Id.* Nor did it identify the individuals other than the charging party against whom petitioner allegedly discriminated, or otherwise define the size or scope of the class of alleged victims. *Id.*

The Commission then presented petitioner with a verbal conciliation demand. What further conciliation efforts the Commission made are not disclosed in the record, as the EEOC has insisted that Title VII prohibits petitioners from trying to prove, or the district court from considering, what the Commission did or did not do in an attempt to reach an informal resolution.[3] The record does show, however, that the EEOC eventually notified

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[3] The Commission threatened to seek sanctions against petitioner's counsel *personally* if they made any submission to the court attempting to show that the EEOC had breached its conciliation obligation. *See* J.A. 88.

petitioner that it had determined that the conciliation process had failed and that further discussions would be futile. J.A. 18-19.

2. A few days later, the Commission sued petitioner in the United States District Court for the Southern District of Illinois. *See* J.A. 20-26 (Complaint). The complaint alleged that petitioner had either engaged in "a policy or practice of not hiring women for mining and related positions" or "in the alternative, had a neutral hiring policy which had a disparate impact on women applicants for mining and related positions." *Id.* 21. The Commission sought backpay, compensatory damages, and punitive damages for an undefined "class of female applicants," in "amounts to be determined at trial." *Id.* 24-25. With respect to the process required by Title VII, the Commission alleged that "[a]ll conditions precedent to the institution of this lawsuit have been fulfilled." *Id.* 22.

The same day, the Commission issued a press release, featuring inflammatory quotes from EEOC attorneys, including the assertion that "Mach Mining needs to realize that this is 2011, not 1911."[4] The Commission's attorneys further stated that they hoped that the litigation would send a signal to other employers to reconsider policies having a disparate impact.[5]

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[4] *See* Press Release, ACH Mining Sued by EEOC for Sex Discrimination: Federal Agency Asserts That Coal Mine's Failure to Hire Qualified Female Applicants Violated Civil Rights Law (Sept. 27, 2011), http://goo.gl/Lk5mO5.

[5] *Id.*

Petitioner filed an answer arguing, among other things, that the Commission had failed to fulfill its statutory obligation to conciliate in good faith. J.A. 27-34.[6] The Commission subsequently moved for partial summary judgment, arguing that the "conciliation process is not subject to judicial review." Pet. App. 32a.

The district court denied the motion. *Id.* 31a. The court observed that all of the circuits "that have weighed in on the matter agree that conciliation is subject to at least *some* level of review." *Id.* 35a. The court found it unnecessary to decide whether the EEOC's conciliation efforts were sufficient in this case, because the Commission had elected not "to argue that its conciliation efforts would satisfy either the 'deferential standard' or the 'heightened scrutiny' standard" applied in the various circuits. *Id.* 37a. At the Commission's request, however, the court certified the case for interlocutory appellate review under 28 U.S.C. § 1292(b). Pet. App. 52a.

3. The Seventh Circuit accepted the certified appeal and reversed. The court recognized that every circuit to have addressed the question had held that the EEOC's compliance with the conciliation precondition to litigation is judicially enforceable. But it "disagree[d] with our colleagues in other circuits," *id.* 3a, making itself "the first circuit to reject" the principle that the duty to conciliate is

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[6] In an effort to identify the nature of the claims to be conciliated, petitioner sought limited discovery, including requests for admission with respect to each complainant identified by the Commission. *See* J.A. 47-59; Cert. Reply 3-4.

enforceable, *id.* 24a. The panel held instead that courts are forbidden from conducting any inquiry into whether the Commission has fulfilled its conciliation obligation: "If the EEOC has pled on the face of its complaint that it has complied with all procedures required under Title VII and the relevant documents are facially sufficient, our review of those procedures is satisfied." *Id.* 30a (citation omitted). Because the EEOC made such a cursory allegation in this case, the Seventh Circuit held that the courts had no further role to play. *Id.*

4. This Court subsequently granted petitioner's petition for a writ of certiorari. 134 S. Ct. 2872 (2014).

SUMMARY OF ARGUMENT

The Seventh Circuit wrongly held that the courts are powerless to inquire into Title VII's requirement that the EEOC attempt conciliation before resorting to litigation.

I. Congress intended conciliation to be the preferred means of resolving Title VII complaints, recognizing that conciliation provides a quicker and more certain means of ensuring compliance with the statute and securing relief for victims of discrimination. To that end, Congress expressly conditioned the EEOC's authority to commence Title VII lawsuits on its first attempting to conciliate the dispute.

The Seventh Circuit believed Congress would not have intended for this requirement to be judicially enforceable because Title VII does not expressly provide that noncompliance with the requirement is an affirmative defense. But Title VII does not expressly provide that noncompliance with *any* of Title VII's preconditions to litigation are affirmative defenses. Nonetheless, this Court has repeatedly held that other preconditions, such as the requirement of a timely charge of discrimination, are judicially enforceable. That is in keeping with the Court's construction of other mandatory preconditions to suit and the law's general treatment of conditions precedent to litigation: compliance with such requirements is an element of the plaintiff's claim, which the plaintiff must plead and prove, not an affirmative defense one might expect to be set forth as such in the text of the statute.

II. Courts should hesitate before concluding that Congress has departed from the traditional treatment of conditions precedent to litigation. This is particularly so when Congress has imposed limitations on agency authority, given the longstanding assumption that Congress intends judicial review of administrative action. The reasons the Seventh Circuit gave for its decision do not overcome that presumption.

The court noted that the statute gives the agency broad discretion to decide whether a particular conciliation agreement is acceptable. But that does not preclude judicial review of whether the agency has engaged in a *process* that is recognizable as conciliation. For example, a court need not second-guess the EEOC's substantive determinations about an acceptable conciliation agreement to hold that the Commission must give an employer adequate time and information to consider a settlement proposal and may not conciliate race discrimination with respect to an individual and then file suit claiming sex discrimination against a class.

The Seventh Circuit also pointed to Title VII's confidentiality provision, which states that nothing "said or done" during conciliation "may be made public by the Commission" or "used as evidence in a subsequent proceeding without the written consent of the persons concerned." 42 U.S.C. § 2000e-5(b). But Congress did not enact that provision as a backhanded way of precluding judicial review of the EEOC's conciliation obligation. Public dissemination of conciliation information can be precluded by filing such evidence under seal. And the proscription against using conciliation information as "evidence"

in a "subsequent proceeding," is best understood to preclude only its use to prove or disprove *the merits* of a discrimination claim, as the EEOC itself has argued in other cases. That understanding is confirmed by the history of the provision, which was added to the statute before the EEOC was given litigation authority, at a time when the only possible use of conciliation evidence was to prove or contest the merits of a discrimination claim.

In any event, confidentiality may be waived and should be deemed waived to the extent the parties put conciliation at issue in the case. And even if confidentiality were not waived, that would not preclude judicial enforcement of the conciliation precondition in the material number of cases in which such evidence is not needed.

The Seventh Circuit also was wrong to think that Congress would not have intended the conciliation precondition to be enforceable without providing detailed standards for compliance. Congress left a variety of provisions of Title VII, including this one, for further elaboration by the Commission. Congress authorized the Commission to issue regulations to provide exactly that kind of detail necessary for the implementation of the statute's procedural requirements. The EEOC's decision not to issue meaningful conciliation regulations does not empower it to evade judicial review of its compliance with the statute's most important requirements.

Moreover, four decades of experience have shown that even in the face of the Commission's own self-imposed silence the courts are perfectly capable of establishing reasonable rules that both give content to the conciliation requirement and respect the

Commission's discretion to decide what constitutes an acceptable conciliation agreement.

Finally, the court of appeals had no basis for its cynical view that judicial enforcement of the conciliation requirement would undermine conciliation because employers would forgo meaningful conciliation in favor of accumulating evidence to use in a conciliation defense in litigation. The very fact that Congress made conciliation mandatory shows that it did not share that view. In fact, employers have substantial financial and public relations interests in resolving even arguably non-meritorious discrimination claims in the confidential context of conciliation before a lawsuit or press release is issued. At the same time, the court of appeals' belief that the agency could be counted on to obey the law without judicial superintendence runs counter to the premise of the presumption of judicial review of agency action, while ignoring the real world incentives the agency often faces and the documented history of Commission non-compliance with its conciliation obligations.

ARGUMENT

"The 'primary objective' of Title VII is to bring employment discrimination to an end." *Ford Motor Co. v. EEOC*, 458 U.S. 219, 228 (1982) (citation omitted). The "preferred means for achieving this goal is through cooperation and voluntary compliance." *Id.* (internal punctuation and citation omitted). Congress thus required that before the EEOC may institute litigation, it must first attempt to resolve discrimination claims through conciliation, "thereby bringing defendants into 'voluntary

compliance' and ending discrimination far more quickly than could litigation proceeding at its often ponderous pace." *Id.*

Notwithstanding that Congress refused to leave it up to the EEOC to decide whether conciliation was worth pursuing before filing suit, the Seventh Circuit concluded that Congress nonetheless intended to make the mandatory conciliation obligation unenforceable. That conclusion was wrong.

I. The EEOC's Compliance With The Conciliation Precondition Is Subject To Judicial Review.

Consistent with Congress's desire to make litigation a last resort, Title VII establishes "an integrated, multistep enforcement procedure culminating in the EEOC's authority to bring a civil action in a federal court." *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 359 (1977). By its terms, the statute permits suit by the Commission only at the end of that process, expressly making conciliation a precondition to litigation. This Court has repeatedly held that Title VII's other preconditions are subject to judicial enforcement, consistent with the law's general treatment of conditions precedent to litigation. The same principles support judicial enforcement of the conciliation precondition as well.

A. The Plain Text Of Title VII Makes Conciliation A Mandatory Condition Precedent To The Commission's Power To Bring Suit.

Title VII provides that upon finding of reasonable cause, "the Commission *shall* endeavor to

eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." 42 U.S.C. § 2000e-5(b) (emphasis added). And it permits suits by the Commission only *"[i]f* . the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission" within a specified period of time. *Id.* § 2000e-5(f)(1) (emphasis added).

The statutory text thus unambiguously establishes that the EEOC is "required by law to refrain from commencing a civil action until it has discharged its administrative duties," including its "responsibility" for "settling disputes, if possible, in an informal, noncoercive fashion." *Occidental*, 432 U.S. at 368. When Title VII provides that a certain action shall be taken as a precondition to litigation, the word "'shall' makes the act" required by the statute "mandatory." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 109 (2002) (interpreting provision making filing of timely charge mandatory precondition to private suit).[7]

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[7] The Court has left open whether other "steps in the integrated procedure" of Title VII's enforcement provisions constitute mandatory preconditions to the EEOC's investigative or litigation authority. *EEOC v. Shell Oil Co.*, 466 U.S. 54, 64 (1984). For example, the statute requires the EEOC to provide employers prompt notice of a charge of discrimination, 42 U.S.C. § 2000e-5(b), after which the Commission must investigate the claim and may issue judicially enforceable subpoenas, *see id.* § 2000e-9. Because the statute does not directly link the notice requirement to the EEOC's subpoena power, the Court has doubted whether the Commission's failure to issue adequate

Making conciliation a precondition to litigation was not inadvertent. As originally enacted, the Commission's only enforcement authority was the ability to engage in conciliation. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). Congress expanded the Commission's enforcement options in 1972 by authorizing it to bring suit. But in providing the EEOC that additional authority, Congress "did not abandon its wish that violations of the statute could be remedied without resort to the courts, as is evidenced by its retention in 1972 of the requirement that the Commission, before filing suit, attempt to resolve disputes through conciliation." *Shell Oil*, 466 U.S. at 78. Instead, "[c]ooperation and voluntary compliance" remained the "preferred means for achieving th[e] goal" of equal employment opportunity. *Alexander*, 415 U.S. at 44; *see also, e.g., EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 602 (1981) (noting "the statutory goal of maximum possible reliance upon voluntary conciliation and administrative resolution of claims"); *Patterson v. McLean Credit Union*, 491 U.S. 164, 180-81 (1989) (explaining that Title VII's "elaborate administrative procedure" is designed to "work towards the resolution of these claims through conciliation rather than litigation.").

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notice deprives it of the power to issue a subpoena. *See Shell Oil*, 466 U.S. at 65-66. But neither the EEOC nor the Seventh Circuit has doubted that conciliation is a mandatory precondition to litigation. Nor could they. Exhausting conciliation is expressly made a precondition to suit in the very sentence authorizing EEOC suit. *See* 42 U.S.C. § 2000e-5(f)(1).

The conciliation precondition was driven by Congress's recognition that informal resolution of discrimination claims is superior to litigation in a number of respects. For one thing, it is generally much more expeditious at getting relief to injured workers and finality to employers. By design, the conciliation process is intended to be cheap, informal, and relatively quick. *See* 42 U.S.C. § 2000e-5(b); *Burnett v. Grattan*, 468 U.S. 42, 54 (1984); *Gladstone Realtors v. Bellwood*, 441 U.S. 91, 104 (1979) (discussing conciliation procedures of the Fair Housing Act). By contrast, the median time to verdict in a civil case tried in federal court is nearly two years.[8] Litigating complex class or pattern-and-practices cases like this one can take even longer.[9]

Often conciliation is more likely to be effective than post-suit settlement efforts. Employers may be more willing to reach agreement through private conciliation than after suit has been filed, when they may feel compelled to clear their name. That, no doubt, is one of the reasons Congress forbade the Commission from making what is said or done in conciliation public without the consent of the people and companies involved. *See* 42 U.S.C. § 2000e-5(b); *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590,

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[8] *See* Admin. Office U.S. Courts, Federal Judicial Caseload Statistics 2013, tbl C-5, http://goo.gl/mpw2SK.

[9] *See, e.g.*, Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements & Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 820 (2010) (among cases ending in settlement, average time between filing civil rights class action suit and settlement was 3.7 years in 2005-06).

599 n.16 (1981) ("The maximum results from the voluntary approach will be achieved if the investigation and conciliation are carried on in privacy.") (quoting 110 Cong. Rec. 8193 (1964) (Sen. Dirksen)).

B. Failure To Comply With A Condition Precedent To Suit Is Subject To Judicial Review And Remedy.

The Seventh Circuit did not question that conciliation is a mandatory precondition to suit. Instead, it held that the precondition was not enforceable in court, reasoning that the "text of Title VII contains no express provision for an affirmative defense based on an alleged defect in the EEOC's conciliation efforts." Pet. App. 5a-6a. The court found that silence "compelling," *id.* 6a, given Congress's "special care in drawing so precise a statutory scheme," *id.* 5a (quoting *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2530 (2013)). But that reasoning gets the analytical framework exactly backwards: preconditions to suit are presumptively enforceable absent clear indication that Congress intended otherwise. *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 672 n.4 (1986) ("judicial review is the rule" and "the intention to exclude it must be made specifically manifest.") (citation and internal quotation marks omitted); *Traynor v. Turnage*, 485 U.S. 535, 542 (1988) (there is a "strong presumption that Congress intends judicial review of administrative action" and "[t]he presumption in favor of judicial review may be overcome only upon a showing of clear and convincing evidence of a contrary legislative intent.") (citation and internal quotation marks omitted).

1. Title VII's "integrated, multistep enforcement procedure," *Occidental*, 432 U.S. at 359, contains a number of conditions precedent to litigation without expressly stating that noncompliance with *any* of them is subject to judicial review or grounds for a defense. *See* 42 U.S.C. §§ 2000e-5(b), (f)(1). Yet, this Court has repeatedly recognized that other Title VII preconditions are judicially enforceable, treating that conclusion as necessarily following from the fact that the requirement is a condition precedent to litigation.

For example, the Court has held that an employee's failure to file a timely charge requires dismissal of the worker's suit. *See United Air Lines, Inc. v. Evans*, 431 U.S. 553, 555 n.4 (1977) ("Timely filing [of a charge] is a prerequisite to maintenance of a Title VII action."); *see also Morgan*, 536 U.S. at 101, 114-15 (same); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) (same).

The Court likewise has held that the ninety-day time limit for filing a private suit after receiving a right to sue letter is a judicially enforceable condition precedent to suit. *See Baldwin Cnty. Welcome Ctr. v. Brown*, 466 U.S. 147, 149-50 (1984) (per curiam); *see also McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798 (1973) (calling timely filing of charge and receipt of right-to-sue letter "jurisdictional prerequisites to a federal action").[10]

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[10] In more recent cases, the Court has clarified that the preconditions are not necessarily "jurisdictional" in the sense of going to the courts' subject matter jurisdiction. *See Zipes*, 455 U.S. at 393 (explaining that, as a consequence, time limits may be subject to equitable tolling). But the Court has not

It makes no difference that the precondition here applies to suits by the Government. In *EEOC v. Shell Oil Co.*, 466 U.S. 54 (1984), for example, the Commission brought suit to enforce an administrative subpoena. The subject of the investigation, Shell Oil, defended on the ground that Title VII permits the Commission to issue subpoenas only as part of an investigation triggered by a proper charge of discrimination. Shell Oil further argued that the charge against it failed to include the information required by the statute and the EEOC's regulations. *Id.* at 59. Although the statute does not expressly state that non-compliance with the charge requirements is a defense to an EEOC suit to enforce a subpoena, this Court nonetheless enforced the precondition. *Id.* at 67-81. The "existence of a charge that meets the requirements set forth in" the statute, the Court held, "is a jurisdictional prerequisite to judicial enforcement of a subpoena issued by the EEOC." *Id.* at 65. The Court explained that this conclusion flows from Title VII's "integrated, multistep enforcement procedure," *id.* at 62 (citation omitted), under which filing of a valid charge is made a precondition to the EEOC's authority to issue a subpoena, *id.* at 64-65. The Court did not even pause to consider whether such a requirement was judicially enforceable. That much literally went without saying.

It also goes without saying by Congress that noncompliance with a condition precedent to suit is

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questioned that failure to comply with the time limits is a basis for dismissal.

subject to judicial review and remedy. For example, in *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989), this Court construed a provision of the Resource Conservation and Recovery Act of 1976 (RCRA), that provided that "[n]o action may be commenced prior to sixty days after the plaintiff has given notice of the violation" to the Environmental Protection Agency, the state, and the alleged violator. 42 U.S.C. § 6972(b)(1). Like Title VII, the statute did not expressly provide that the condition was subject to judicial enforcement, or that non-compliance constituted a ground for dismissal. *Id.* The plaintiff in *Hallstrom* had failed to comply with the notice requirement, but the district court refused to dismiss the suit. The Ninth Circuit reversed, and this Court affirmed the court of appeals. The Court explained that under "a literal reading of the statute, compliance with the 60-day notice provision is a mandatory, not optional, condition precedent for suit." 493 U.S. at 26. The Court took it as a given, therefore, that the courts were empowered to enforce the condition by dismissing a suit filed in violation of the notice requirement. "As a general rule," the Court explained, "if an action is barred by the terms of a statute, it must be dismissed." *Id.* at 31. Tellingly, for this proposition the Court cited *Baldwin County Welcome Center v. Brown*, 466 U.S. 147 (1984), one of this Court's decisions enforcing Title VII's litigation preconditions. *See Hallstrom*, 493 U.S. at 31.

This Court has applied the same principles to other statutes that impose mandatory preconditions to suit but that do not expressly provide for judicial review or establish noncompliance as a defense. *See,*

e.g., *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 157-58 (2010) (under 17 U.S.C. §§ 501(a), 411(a), copyright registration is a precondition "plaintiffs ordinarily must satisfy before filing an infringement claim"); *Jones v. Bock*, 549 U.S. 199, 211-12 (2007) (failure to comply with administrative exhaustion requirement of the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e(a), is a basis for dismissal); *United States v. Zucca*, 351 U.S. 91, 94 (1956) (upholding dismissal of denaturalization suit when government failed to comply with precondition); *United States v. Felt & Tarrant Mfg. Co.*, 283 U.S. 269, 272 (1931) ("The filing of a claim or demand as a prerequisite to a suit to recover taxes paid is a familiar provision of the revenue laws, compliance with which may be insisted upon by the defendant . . .").

2. The Seventh Circuit reached the opposite conclusion in part because it wrongly assumed that non-compliance with a condition precedent to suit should be viewed as an affirmative defense, which one might expect Congress to expressly establish, just as it would expressly create a private right of action. Pet. App. 19a-20a.

The problem is that prerequisites to suit like Title VII's conciliation precondition are properly considered conditions precedent to suit, not affirmative defenses. *See, e.g.*, *Hallstrom*, 493 U.S. at 26 (notice of claim requirement a "condition precedent for suit"); *Montes v. Vail Clinic, Inc.*, 497 F.3d 1160, 1167 (10th Cir. 2007) ("[W]e and every circuit court to address the question directly therefore have deemed compliance with Title VII's filing deadline as a condition precedent rather than

an affirmative defense.") (collecting citations). And conditions precedent are treated as elements of the plaintiff's claim, which the plaintiff must plead and prove. *See* Fed. R. Civ. P. 9(c) (plaintiff bears burden of pleading conditions precedent); *Myers v. Cent. Fla. Invs., Inc.*, 592 F.3d 1201, 1223-25 (11th Cir. 2010) (plaintiff must plead satisfaction of conditions precedent to Title VII suit, including filing of EEOC charge). For that very reason, the EEOC's complaint in this case alleges that it had satisfied the preconditions to suit. J.A. 22, at ¶ 6 (EEOC Complaint).

Congress does not ordinarily state expressly that failure to plead or prove an element of one's claim is an affirmative defense. *See* Pet. App. 29a. One would no more anticipate Congress to provide that failure to conciliate is a basis for defense than one would expect it to create an express affirmative defense for failure to prove discrimination.[11]

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[11] The panel was wrong in any event to conclude that Congress must expressly identify an affirmative defense in the way it must expressly establish a private right of action. This Court has held, for example, that failure to comply with the PLRA's exhaustion requirement, although an affirmative defense, is a mandatory basis for dismissal, even though the statute does not expressly provide for judicial review of exhaustion or say that failure to exhaust is a defense. *See Jones*, 549 U.S. at 211-12.

II. The Seventh Circuit Identified No Valid Basis For Exempting The Conciliation Precondition From Judicial Enforcement.

The court of appeals nonetheless thought that judicial enforcement of this particular precondition to suit was undesirable for various reasons. None of the court's objections provides an adequate basis for declining to enforce the statute's requirements.

A. Courts Should Not Conclude That Preconditions To Litigation Are Precatory Unless Congress Unambiguously So Provides.

This Court should not lightly assume that Congress intended the conciliation precondition to be mandatory, but unenforceable. Leaving compliance with an important statutory requirement up to the good faith of a government agency runs contrary to the basic understanding that "strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980).

This is no less true when Congress imposes procedural requirements on a government agency. The "statutes of Congress are not merely advisory when they relate to administrative agencies, any more than in other cases." *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 671 (1986) (citation omitted). To the contrary, the Court has long applied a "strong presumption that Congress intends judicial review of administrative action." *Traynor v. Turnage*, 485 U.S. 535, 542 (1988) (citations and internal punctuation omitted). Accordingly, "judicial

review is the rule" and "the intention to exclude it must be made specifically manifest." *Bowen*, 476 U.S. at 672 n.4 (citation and internal quotation marks omitted); *see also Traynor*, 485 U.S. at 542 ("The presumption in favor of judicial review may be overcome 'only upon a showing of 'clear and convincing evidence' of a contrary legislative intent.'") (citation omitted).

In light of the combined traditions of judicial enforcement of conditions precedent to litigation, and the equally strong presumption of judicial review of agency action, Congress's failure to expressly distinguish the conciliation precondition from the other enforceable Title VII conditions precedent ought to be fatal to the EEOC's attempt to avoid judicial scrutiny. But even if intent to exclude judicial review of an agency's satisfaction of an express condition precedent to suit could ever be found absent express statutory text, there is no sufficient basis for inferring it here.

B. Giving The EEOC Discretion To Decide The Substance Of An Acceptable Conciliation Agreement Does Not Indicate That Congress Intended To Preclude Judicial Enforcement Of The Non-Discretionary Duty To Conciliate Before Resorting To Litigation.

The court of appeals thought it significant that the statute requires only that the EEOC "endeavor" to reach an agreement through "informal" means, and that the Commission may sue if it is unable to obtain a "conciliation agreement acceptable to the Commission." Pet. App. 7a (quoting 42 U.S.C.

§§ 2000e-5(b), (f)(1) (emphasis omitted)). From this, it wrongly concluded that Congress would not have intended such a discretionary process to be subject to judicial review.

The fact that the Commission's decision whether to *accept* a conciliation offer is discretionary only highlights that its obligation to *engage* in conciliation prior to litigation is not. As discussed, Congress could not have been clearer that conciliation is mandatory. Nor is there any basis to doubt that the EEOC's fulfillment of its conciliation obligation prior to commencing litigation is essential to the proper operation of the statutory scheme.

The court of appeals believed that this mandatory requirement cannot be judicially enforced without trenching on the EEOC's discretion to decide whether a particular conciliation agreement is acceptable, Pet. App. 12a, but that assumption is baseless. The Seventh Circuit grudgingly acknowledged that other circuits have long recognized a distinction between enforcing the EEOC's procedural obligation to conciliate and its discretionary authority to decide the substance of an acceptable conciliation agreement. *Id.* 24a-27a. For example, a court need not inquire into the substantive adequacy of the parties' proposals to determine that the EEOC may not conciliate claims of race discrimination with respect to an individual, then file suit claiming sex discrimination against a class. *See, e.g.*, *Patterson v. Am. Tobacco Co.*, 535 F.2d 257, 271-72 (4th Cir. 1976). Likewise, a court does not impair the Commission's discretionary authority over the content of a conciliation agreement by requiring the EEOC to provide defendants basic

information about its claims and demands, or adequate time to evaluate them. *See infra* Parts II.C., and II.D.2. Such requirements simply compel the EEOC to engage in a procedure that is recognizable as conciliation.

C. The Statute's Confidentiality Provision Does Not Preclude Enforcement Of The Conciliation Mandate.

The court of appeals also was wrong in believing that judicial enforcement of the conciliation provision "conflicts directly with the confidentiality provision" in Title VII. Pet. App. 7a. That provision declares that:

> Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, used as evidence in a subsequent proceeding without the written consent of the persons concerned.

42 U.S.C. § 2000e-5(b).

Given the strong presumption that preconditions to litigation are judicially enforceable, and that agency action is judicially reviewable, one would expect that if Congress intended to preclude judicial enforcement of the conciliation precondition, it would have said so directly, not through the winks and nods of an evidentiary limitation. It would be particularly strange for Congress to do so through an evidentiary limitation that can be waived by the parties, such that compliance with the precondition could be enforced in some cases, but not others, depending on whether the Commission (or other parties) chose to waive confidentiality.

In any event, the provision is perfectly compatible with judicial enforcement of the conciliation obligation. *See* Pet. App. 48a-51a. The first part of the provision – prohibiting the Commission from making conciliation details public – is easily satisfied by placing the relevant evidence under seal. *See Associated Dry Goods Corp.*, 449 U.S. at 598-600 (explaining that statutes' confidentiality provisions do not preclude all disclosures of confidential information, only disclosures to the general public). The court of appeals did not contend otherwise. *See* Pet. App. 8a-9a & n.1.

The proscription against using conciliation matters "as evidence in a subsequent proceeding" is also no barrier to judicial enforcement, for several reasons.

First, as the EEOC itself has previously argued, the provision is most sensibly read to prohibit using what was said or done in a conciliation as evidence going to the merits of the claims. *See EEOC v. Philip Servs. Corp.*, 635 F.3d 164, 165 (5th Cir. 2011) ("The Commission argues that this court should read the statute as prohibiting disclosure only in subsequent proceedings on the merits of the charge . ."); Pet. App. 50a-51a. The word "evidence" most commonly and immediately refers to information used to prove a claim on the merits, not everything a court might consider in the course of administering the litigation. Thus, in other statutes, Congress has expressly distinguished between using information as "evidence" and using it for other purposes in litigation. *See, e.g.*, 42 U.S.C. § 3789g(a) (providing that certain information gathered by government "shall not, without the consent of the person

furnishing such information, be admitted *as evidence or used for any purpose* in any action, suit, or other judicial, legislative, or administrative proceedings") (emphasis added); 42 U.S.C. § 10708(b) (same language); 7 U.S.C. § 2276(b)(2) (same); 13 U.S.C. § 9(a) (same); 10 U.S.C. § 613a (same); 15 U.S.C. § 281a (materially same language).

That interpretation is in line with the principal legal provision protecting the confidentiality of settlement negotiations in general, Federal Rule of Evidence 408. That rule prohibits use of settlement negotiation as evidence "either to prove or disprove the validity or amount of a disputed claim or to impeach by prior inconsistent statement or a contradiction." Fed. R. Evid. 408(a).

To be sure, the Title VII confidentiality provision says that conciliation matters may not be used "as evidence in a subsequent proceeding," without expressly stating that the prohibited use is with respect to the merits of the discrimination claim. But any inference that Congress intended also to preclude using conciliation evidence to enforce compliance with the conciliation mandate is dispelled by the statute's history. The confidentiality provision was part of the original statute, under which the EEOC could only conciliate claims and only individuals could sue. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(a), 78 Stat. 241, 259. Because private plaintiffs could hardly be held accountable for the EEOC's failure to conduct adequate conciliation, inadequate conciliation was not a defense to private suit. *See Canavan v. Beneficial Fin. Corp.*, 553 F.2d 860, 863 (3rd Cir. 1977); *Dent v. St. Louis-San Francisco Ry. Co.*, 406 F.2d 399, 402-03 (5th Cir.

1969), *cert. denied*, 403 U.S. 912 (1969); *Johnson v. Seaboard Air Line R.R. Co.*, 405 F.2d 645, 648 (4th Cir. 1968), *cert. denied*, 394 U.S. 918 (1969). Accordingly, courts would never have occasion to consider what was said or done in conciliation as evidence going to anything other than the merits of the discrimination claim. Banning such use was the only function of the confidentiality provision. *See, e.g., Branch v. Phillips Petroleum Co.*, 638 F.2d 873, 880-81 & n.6 (5th Cir. 1981).[12]

When Congress gave the EEOC litigating authority in 1972, and conditioned its right to sue on compliance with the conciliation mandate, it made no material alteration to the confidentiality provision. *See* Equal Employment Opportunity Act of 1972, *supra*, § 4(a). There is nothing in the legislative history or background that gives reason to think that Congress intended the confidentiality provision to operate any differently after 1972 (*i.e.*, to prohibit anything other than use of conciliation evidence to prove or dispute the merits of a lawsuit). There is certainly no reason to think Congress intended the provision to preclude enforcement of the conciliation precondition it had just enacted.

Other parts of the statute confirm this understanding. As originally enacted, and to this

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[12] It was also a necessary function because Federal Rule of Evidence 408 was not enacted for another ten years. *See* Fed. R. Evid. 408, advisory committee notes to 1974 enactment (noting that prior to rule, under "existing federal law evidence of conduct and statements made in compromise negotiations [was] admissible in subsequent litigation between the parties").

day, Title VII permits courts to stay proceedings for up to sixty days to allow further conciliation. *See* 42 U.S.C. § 2000e-5(f)(1). Congress would not have thought that the confidentiality provision required the district court to exercise its discretion blindly. Instead, Congress would have understood that the court would need to know something about the prior conciliation efforts. The confidentiality provision can be reconciled with that expectation by construing it to preclude submission of conciliation evidence only to support or disprove a discrimination claim on the merits.

Second, even if applicable, the confidentiality limitation should be deemed waived when parties put compliance with the precondition at issue in court. *See* 42 U.S.C. § 2000e-5(b) (use of conciliation evidence prohibited only in the absence of "written consent of the persons concerned"). As noted above, compliance with the conciliation condition precedent to suit is part of what the EEOC must prove to establish its case. However, the Commission need not disclose confidential information to satisfy that obligation in every case. Compliance with conditions precedent to litigation can be alleged generally. *See* Fed. R. Civ. P. 9(c). If that allegation is not controverted, there should be no need to introduce any conciliation evidence. On the other hand, if the employer controverts the allegation by moving to dismiss or for summary judgment, the employer should be deemed to waive confidentiality to the extent necessary to adjudicate the specific failures the defendant alleges. And to the extent that the EEOC is a "person[] concerned" within the meaning of the statute, the Commission may also waive

confidentiality to the same extent in order to meet its burden of proving compliance with the precondition, in which case the evidence may be submitted based on the consent of the parties. If the Commission for some reason refuses to waive confidentiality, its claim may be dismissed for failure of proof while still preserving confidentiality.[13]

This regime is consistent with the treatment afforded other waivable privileges by courts and the federal rules. *See, e.g.*, *Mitchell v. United States*, 526 U.S. 314, 321 (1999) (privilege against self-incrimination); Fed. R. Evid. 502(a) (attorney client privilege); *Willy v. Admin. Review Bd.*, 423 F.3d 483, 497 & n.63 (5th Cir. 2005) (same, collecting cases).[14]

Third, in a material number of cases, no evidence regarding what was "said or done" in conciliation is needed to decide whether the EEOC has complied with the conciliation mandate. As discussed below,

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[13] The same result appropriately would follow if a complainant participated in the conciliation but refused to waive confidentiality. If multiple complainants participated, but only some refused to waive confidentiality, the claims regarding the non-waiving complainants could be dismissed and anything "said or done" by those complainants excluded from evidence. 42 U.S.C. § 2000e-5(b).

[14] In fact, in this case, the Commission initially insisted that by raising a conciliation defense, petitioner had waived its right to maintain the confidentiality of the conciliation proceedings. *See* J.A. 36. Petitioner informed the Commission that its assertion was premature, as petitioner had not yet moved for dismissal or summary judgment on the basis of inadequate conciliation, but that when the time came, petitioner would agree to waive confidentiality to the extent necessary to adjudicate the defense. *See* J.A. 38.

in many cases, the conciliation objection is that the Commission refused to engage in any relevant conciliation at all, by failing, for example, to conciliate with a particular defendant, over particular claims, or with respect to certain alleged victims. *See infra* Part II.D.2. In other cases, the complaint is that the EEOC failed to respond to reasonable requests for information regarding its claims. *See id.* In such cases, the relevant facts may be undisputed, obviating the need to admit what was said or done in conciliation "as evidence." 42 U.S.C. § 2000e-5(b).[15] In any case, examining the *subject matter* of the conciliation, or the Commission's failure to respond to requests for information, does not require a court to consider any confidential conciliation details. *See Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976, 981 (6th Cir. 2003) (recognizing privilege for settlement negotiation communications but distinguishing the "existence of settlement talks" from the details of "settlement communications"); *Kelley v. Sec., U.S. Dep't Hous. & Urban Dev.*, 3 F.3d 951, 956-57 (6th Cir. 1993) (noting that even if the statute were read to prevent "disclosure of offers, submissions, concessions and similar negotiating efforts during conciliation," that would not "preclude an examination of the conciliation *process* itself")

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[15] *See, e.g.*, *EEOC v. Pet, Inc.*, 612 F.2d 1001, 1002 (5th Cir. 1980); *EEOC v. Sears, Roebuck & Co.*, No. 79 Civ. 5708 (KTD), 1980 WL 180, at *1 (S.D.N.Y. June 16, 1980) (same), *aff'd*, 650 F.2d 14 (2nd Cir. 1981).

(emphasis added) (discussing parallel provision of the Fair Housing Act, 42 U.S.C. § 3610(d)(1)).

D. The Conciliation Requirement Is Susceptible To Neutral Judicial Enforcement.

The court of appeals also believed that Congress would not have intended judicial enforcement of the conciliation precondition given the purported "lack of any meaningful standard to apply." Pet. App. 9a. But the court ignored that Congress simultaneously gave the EEOC authority to elaborate the procedural requirements of the statute. And it disregarded the various contexts in which courts and other adjudicative bodies have managed to enforce conciliation obligations, including the four decades of experience other circuits have accumulated enforcing the Title VII conciliation mandate.

1. *The EEOC Is Empowered To Issue Regulations Defining The Conciliation Obligation.*

Congress did not define in detail what counts as "conciliation" within the meaning of the statute, just as it did not define what constitutes a "charge" or how a charge is "filed." *See EEOC v. Shell Oil*, 466 U.S. 54, 67-74 (1984) (considering required content of a charge); *Love v. Pullman Co.*, 404 U.S. 522, 524-26 (1972) (considering whether charge was properly filed). That is no basis, however, to conclude that Congress intended to forbid the courts from considering whether a lawsuit was preceded by the timely filing of a proper charge or adequate conciliation.

Instead, recognizing that the statute did not contain all the detail required for its administration, Congress gave Commission authority to issue "suitable procedural regulations to carry out" Title VII. 42 U.S.C. § 2000e-12(a). Using that authority, the Commission has previously defined in greater detail standards for complying with the statute's various procedural requirements, including filing the initial charge,[16] serving the charge on the employer,[17] investigating the charge,[18] issuing of no-cause or reasonable-cause determinations,[19] and issuing right-to-sue letters.[20]

Thus, in *Shell Oil*, this Court held that the timely filing of a proper charge was a judicially enforceable precondition to EEOC litigation, even while recognizing that the "statute itself prescribes only minimal requirements pertaining to the form and content of charges of discrimination." 466 U.S. at 67. The Court did not conclude that the lack of greater statutory guidance indicated that Congress intended to preclude judicial enforcement of the requirement. Instead, the Court deferred to the Commission's regulations defining what information a valid charge required. *Id.*; *see also Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 397 (2008) (deferring to EEOC's regulations defining "charge").

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[16] 29 C.F.R. §§ 1601.9, 1601.12.

[17] *Id.* § 1601.14.

[18] *Id.* §§ 1601.15-.17.

[19] *Id.* §§ 1601.18-.21.

[20] *Id.* § 1601.28.

There is no reason why the Commission could not do the same thing here and issue regulations that provide more detailed content to the conciliation obligation, even while protecting the Commission's discretion to decide what constitutes an acceptable agreement.[21] In fact, the EEOC has already begun to develop internal standards for "evaluating the quality of EEOC investigations and conciliations," through a Draft Quality Control Plan.[22] Of course, that plan is, by design, non-binding. But the fact that the EEOC has chosen to elaborate the meaning of the conciliation requirement in non-binding quality control principles rather than enforceable regulations is no reason to allow it to thereby avoid judicial review of its compliance with the statute.

2. *Experience Demonstrates That Conciliation Requirements, Including Title VII's, Are Susceptible To Judicial Enforcement.*

The Seventh Circuit was wrong as well to think that there is something special about a conciliation requirement that makes it incapable of judicial enforcement. Courts and other tribunals have enforced this and other similar obligations for many years.

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[21] The Commission has a regulation on conciliation, but it does little more than parrot the statute. *See* 29 C.F.R. § 1601.24.

[22] *See* EEOC, U.S. Equal Employment Opportunity Commission Quality Control Plan 2013 Draft Principles, http://goo.gl/H8QyS0.

For example, in *Litton Financial Printing Division v. NLRB*, 501 U.S. 190 (1991), this Court explained that provisions of the National Labor Relations Act "require an employer to bargain 'in good faith with respect to wages, hours, and other terms and conditions of employment.'" *Id.* at 198 (quoting 29 U.S.C. § 158(a)(5), (d)). Rather than throw up its hands and declare the provision unenforceable, the Court enforced the obligation, giving due deference to the National Labor Relation Board's "interpretation of the NLRA requirement that parties bargain in good faith." *Id.* at 200.

The Seventh Circuit treated the NLRA as an unwise anomaly, incapable of neutral judicial enforcement. Pet. App. 11a-12a. But the duty to negotiate or mediate in good faith prior to litigation or arbitration is also a precondition in many collective bargaining and other agreements, and that duty is commonly enforced by courts or arbitrators. *See, e.g.*, *BG Grp., PLC v. Republic of Argentina*, 134 S. Ct. 1198, 1207-08 (2014); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 555-57 (1964); *JPD, Inc. v. Chronimed Holdings, Inc.*, 539 F.3d 388, 390 (6th Cir. 2008); *Lumbermens Mut. Cas. Co. v. Broadspire Mgmt. Servs., Inc.*, 623 F.3d 476, 478 (7th Cir. 2010); *see also, e.g.*, INT'L BAR ASS'N, IBA GUIDELINES FOR DRAFTING INTERNATIONAL ARBITRATION CLAUSES 30 (2010) ("It is common for dispute resolution clauses in international contracts to provide for negotiation, mediation or some other form of alternative dispute resolution as preliminary steps before arbitration.").

But the best evidence that the Title VII conciliation requirement can be judicially enforced is that it *has been* judicially enforced in other circuits

for decades. *See* Pet. App. 25a (collecting cases). Although courts have differed somewhat in the details, all have construed Title VII to require the EEOC to negotiate in good faith and have given greater content to that obligation in the context of case-by-case adjudication. *Id.*

From these decisions, it is possible to identify a number of reasonable principles that give concrete content to the conciliation obligation without entangling courts in the substance of the parties' negotiating positions. Specifically, the EEOC must at least:

a. Attempt conciliation with each defendant regarding every claim and claimant. Conciliation cannot achieve its intended purpose of providing an expeditious alternative to litigation unless the EEOC attempts conciliation with each defendant regarding each claim. It cannot, for example, pursue sex discrimination claims against a union, when it only attempted conciliation of those claims with the employer.[23] Likewise, it cannot conciliate race discrimination in hiring claims, then litigate sex discrimination in promotion claims.[24] Nor

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[23] *See Patterson v. Am. Tobacco Co.*, 535 F.2d 257, 271-72 (4th Cir. 1976). In this case, for example, the EEOC sought discovery regarding other companies it suspects were involved in petitioner's operations, telling the district court that the evidence could lead it to join the other companies as defendants and insisting that it may do so without first attempting conciliation with them. *See* R. 115-10.

[24] *See Patterson*, 535 F.2d. at 271-72; *EEOC v. Am. Nat. Bank*, 652 F.2d 1176, 1186 (4th Cir. 1981) (dicta).

can conciliation perform its intended function unless the EEOC negotiates regarding all the alleged victims for whom it seeks remedial relief.[25]

b. Inform the defendant what steps it believes are necessary to "eliminate the alleged unlawful employment practice." § 2000e-5(b).[26] In other words, the EEOC must inform the defendant what would constitute "a conciliation agreement acceptable to the Commission." § 2000e-5(f)(1). This includes what actions EEOC expects the defendant to take to change its employment practices, as well as what monetary or other relief it expects the employer to provide alleged victims.

c. Provide the defendant with the basic information about the Commission's claims and demands that a defendant needs in order to evaluate any settlement proposal. Genuine conciliation cannot take place unless the EEOC explains the basis for its demands. *See EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 601 (1981) ("A party is far more likely to settle when he has enough information to be able to assess the strengths and weaknesses of his opponent's case as well as his own."). While one might hope that the EEOC's

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[25] *See Hill v. W. Elec. Co., Inc.*, 672 F.2d 381, 390 n.6 (4th Cir. 1982) (cannot conciliate individual claims, then litigate class claims); *EEOC v. Sears, Roebuck & Co.*, 650 F.2d 14, 19 (2nd Cir. 1981) (cannot conciliate class claims, then bring individual claims never discussed in conciliation).

[26] *See EEOC v. Klingler Elec. Corp.*, 636 F.2d 104, 107 (5th Cir. 1981); *Marshall v. Sun Oil Co.*, 605 F.2d 1331, 1334 (5th Cir. 1979).

reasonable cause determination would provide that information, the Commission regularly limits its investigative findings to utterly conclusory allegations of unlawful conduct. *Compare* J.A. 14-17 (reasonable cause determination in this case)[27] *with Associated Dry Goods*, 449 U.S. at 601 n.18 (noting that in 1981, it was the Commission's practice to "explain the factual basis for its conclusion" when it issued its probable cause determination, and observing the "important benefits of the reasonable-cause determination would be lost" if the Commission "announce[d] no more than its bare conclusion on reasonable cause.").

Accordingly, to engage in genuine conciliation, the Commission must provide an outline of the factual and legal basis for the claims.[28] In addition, at least when asked, it must explain the basis of its remedial demands. For example, when the EEOC asks for monetary relief, it must explain how it arrived at the amount of any monetary relief demanded; it cannot simply pick an arbitrary number and state its intention to sue if the defendant does

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[27] The reasonable cause letter in this case stated only that EEOC had "determined that the evidence obtained during the course of the investigation establishes reasonable cause to believe that Respondent discriminated against Charging Party and a class of female applicants, because of their sex, in that Respondent failed to recruit and hire them, in violation of Title VII." J.A. 15.

[28] *See Klingler Elec. Corp.*, 636 F.2d at 107; *Marshall*, 605 F.2d at 1335.

not pay it.[29] And because an employer cannot be expected to agree to hire, promote, or reinstate an employee unless it knows who that person is and can evaluate her qualifications, the Commission must identify the particular individuals for whom it seeks such relief.

d. Provide the employer a reasonable amount of time to review and respond to a conciliation offer. While it should go without saying that an employer needs time to evaluate a conciliation demand, the Commission has sometimes failed even that basic standard of good faith negotiation.[30]

e. Accept and consider counter-offers. Although the EEOC retains discretion to decide what constitutes an acceptable conciliation agreement, conciliation necessarily implies a process of communication and negotiation. It cannot simply make an initial "take-it-or-leave it" offer and declare conciliation a failure if the defendant does not simply acquiesce.[31]

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These modest and reasonable procedural requirements are readily derived from the text of the

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[29] *Cf. EEOC v. Agro Distr., LLC*, 555 F.3d 462, 468 (5th Cir. 2009) (finding EEOC made an "insupportable demand for compensatory damages as a weapon to force settlement").

[30] *See, e.g.*, *EEOC v. Trans States Airlines*, 462 F.3d 987, 996 (8th Cir. 2006); *EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1258-59 (11th Cir. 2003).

[31] *See Agro Distr.*, 555 F.3d at 468.

statute and ordinary understandings of what it means to attempt real conciliation of a dispute. Unless the agency undertakes these basic prerequisites of genuine conciliation, it cannot reasonably claim that it was "*unable* to secure from the respondent a conciliation agreement acceptable to the Commission," 42 U.S.C. § 2000e-5(f)(1) (emphasis added). For example, when the Commission offers an employer a take-it-or-leave-it demand for millions of dollars without identifying how it arrived at that number, the number of alleged victims, or any factual basis to believe that the claims have merit, it is more accurate to say that the Commission has *chosen* not to secure an acceptable conciliation agreement and has failed to engage in anything recognizable as an attempt to "eliminate [the] alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." *Id.*[32] Such an illusory "conciliation" fails to fulfil Title VII's mandate that EEOC settle "disputes, if possible, in an informal, *noncoercive* fashion." *Occidental*, 432 U.S. at 367-68 (emphasis added).

At the same time, the principles described above do not "invite[] ad hoc assessments of whether the

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[32] For that reason, and because the EEOC is charged with elaborating the procedural requirements of the statute through regulations, there is no basis to claim that *all* aspects of the conciliation process, including non-substantive issues of procedure, are effectively committed to agency discretion by the statute's failure to provide any "meaningful standard against which to judge the agency's" conduct. Pet. App. 13a (quoting *Wester v. Doe*, 486 U.S. 592, 600 (1988) (interpreting Section 701(a) of the Administrative Procedures Act)).

EEOC played fairly or took reasonable substantive positions." Pet. App. 27a. Instead, they simply impose reasonable *procedural* requirements that ensure that the Commission will give employers the basic information any responsible litigant would need before acquiescing to the agency's demands. Indeed, the Commission has implicitly recognized the reasonableness of at least some of these requirements by including them in the agency's Draft Quality Control Plan, including, for example, the requirement that the Commission "inform[] the parties of the proposed categories of relief and how monetary terms were reached" and also "respond[] appropriately to reasonable offers made by the parties."[33]

If the agency believes that other aspects of the courts' conciliation case law place an unfair burden on the Commission, or constitute an unwarranted intrusion on its discretion, the EEOC remains free to alter the standards by issuing reasonable regulations. *See, e.g.*, *Nat'l Cable & Telecom. Ass'n. v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005).

Of course, no one would accept as reasonable a regulation that stated that the Commission may decline to conciliate at all with particular defendants or regarding particular claims or claimants, or that the EEOC may issue large monetary demands with

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[33] *See* U.S. Equal Employment Opportunity Commission Quality Control Plan 2013 Draft Principles, *supra*; *see also* EEOC, Resolving a Charge, http://www.eeoc.gov/employers/resolving.cfm (in describing conciliation process, stating that "Conciliation discussions are negotiations and **counter-offers may be presented**") (emphasis in original).

no explanation of how they were calculated and then require a response within twenty-four hours. Yet that is the practical effect of the Commission's failure to issue any meaningful regulations at all and the Seventh Circuit's ruling that courts may not develop and enforce rules to fill that void.

E. Judicial Review Does Not Undermine Conciliation.

Finally, the court of appeals hypothesized that judicial enforcement of compliance of the conciliation precondition "invites employers to use the conciliation process to undermine enforcement of Title VII" rather than as an "opportunity resolve a dispute." Pet. App. 16a. At the same time, it assumed that even without the prospect of judicial enforcement, the EEOC would faithfully comply with its conciliation duty. Pet. App. 20a-21a.

While these might be perfectly fine arguments to make to Congress, they are not grounds for refusing to enforce the statute as written. *See Hallstrom*, 493 U.S. at 31 (explaining that such arguments "disregard the plain language" of a statute establishing a precondition to litigation). In any event, Seventh Circuit's speculation has no foundation.

1. The panel justified its conclusion that employers would attempt to game the system through an extended law-and-economics style thought experiment. *See* Pet. App. 16a-18a. The lack of citation to any empirical support is telling – the condition has been enforced in other circuit for four decades, yet the court of appeals cited to no

substantial evidence in reality bearing out its hypothesis.[34]

In any event, the court of appeals' musings are premised on a fundamental misunderstanding of the incentives employers face. The court assumed that often an "employer's incentive to reach an agreement" will be "outweighed by the incentive to stockpile exhibits" in support of a conciliation defense at trial. Pet. App. 17a. But the court greatly underestimated employers' incentives to settle discrimination claims through conciliation. Successful conciliation avoids what can be enormous litigation costs, as well as substantial distraction and disruption to the employer's business. Often even more importantly, because it is a confidential process, a successful conciliation can avoid harmful public allegations of wrongdoing. The panel thus betrayed its ignorance of business realities when it brushed aside as trivial the impact of the Government filing a complaint and issuing press releases accusing a company of particularly odious illegal conduct. Pet. App. 18a.

The court also disregarded that many companies, when faced with allegations that their employees have engaged in illegal discrimination, are genuinely interested in finding out the truth, stopping any unlawful discrimination, and making amends to

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[34] In its cert-stage brief, the Government insinuated that this case is an example of what the Seventh Circuit feared. *See* BIO 18-19. But as the cert. reply demonstrated, its assertions were unfounded, premised on a misleading description of the record. *See* Cert. Reply 3-4.

victims. But they cannot do so when the EEOC issues its investigative findings, as in this case, in utterly conclusory terms and then refuses during conciliation to provide the employer the basic information anyone wanting to find out the truth would need to know. That is particularly true when the employer's own investigation uncovers no substantial evidence of discrimination – although an employer may be perfectly willing to acknowledge it may have missed something, it cannot be expected to simply take the EEOC's word for it, as the EEOC is not infallible either.[35]

The panel thus acted with surprising and unjustified cynicism in scoffing at the proposition that an employer might raise a conciliation defense "out of a desire to see their adversary across the negotiating table again." Pet. App. 17a. Congress plainly did not share the panel's apparent view that *genuine* conciliation serves no purpose and is unlikely to lead to any different result than grossly inadequate efforts.

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[35] *See, e.g.*, *Agro Distr.*, 555 F.3d at 473 (affirming award of attorney's fees against Commission for pursuing obviously meritless discrimination claims); *EEOC v. Propak Logistics, Inc.*, 746 F.3d 145, 154 (4th Cir. 2014) (same); *EEOC v. Peoplemark, Inc.*, 732 F.3d 584, 591-92 (6th Cir. 2013) (same); *EEOC v. Tricore Reference Labs.*, 493 Fed. App'x. 955, 960-61 (10th Cir. 2012) (same); *see generally* Press Release, EEOC Issues Comprehensive Litigation Report (Aug. 13, 2002), http://goo.gl/XHlhXr (stating that although EEOC settles approximately 91% of suits filed, it wins only about 60% of those it litigates to judgment).

This is not to deny that some employers will have no interest in conciliation or may seek to use a conciliation defense to avoid liability for unlawful conduct. This is a big country, with many employers, and they are not all the same. The point instead is that Congress indisputably believed that requiring the EEOC to conciliate prior to litigating would, on balance, be better than leaving it up to the agency to decide for itself when to litigate first and seek settlement later. If it had shared the Seventh Circuit's skepticism of the value of good faith conciliation, it never would have enacted the conciliation provision in the first place.

2. Without any sense of irony, the panel traded its cynic's goggles for rose-colored glasses when it switched focus to the EEOC itself. The panel assumed that Congress would not have intended judicial enforcement of the conciliation precondition but instead would have trusted the agency to comply with the law on its own. Pet. App. 20a-21a. One need not assume the worst of the agency to recognize the implausibility of that assumption.

To start, the long-standing strong presumption in favor of judicial review of agency action is premised on the opposite understanding. "Without judicial review," this Court has said, "statutory limits would be naught but empty words." *Bowen*, 476 U.S. at 672 n.3 (citation omitted). The court of appeals did not cite to anything in the language or history of the statute to show that Congress entertained the contrary presumption in this case. *See* Pet. App. 18a-21a.

Nor are the reasons the court gave for its special confidence in the agency compelling. The court noted

that the EEOC is subject to presidential and congressional oversight. Pet. App. 20a-21a. But that, of course, is true of virtually every agency.[38] Nonetheless, as noted, this Court does not generally presume that Congress left enforcement of statutory requirements on agency conduct to the political branches.

The court of appeals also noted that the EEOC receives many complaints, but litigates few cases even among those it finds to have merit. Pet. App. 20a. It assumed that this means that the Commission has an incentive to conciliate cases successfully. That may be fair general assumption, but it ignores that the agency (or particular agency employees) may face countervailing incentives as well.

For example, EEOC officials may also have incentives to file cases in order to demonstrate – to superiors within the agency, others within the executive branch, members of Congress, interest groups, or the public at large – that they are zealously enforcing the statute. That is, some agency officials may believe, rightly or wrongly, that they get more credit for filing cases than for conciliating claims with some of their constituencies, including, perhaps, those responsible for agency budgets. *Cf.* Barry A. Hartstein, ed., ANNUAL REPORT ON EEOC DEVELOPMENTS: FISCAL YEAR 2013: AN ANNUAL REPORT ON EEOC CHARGES, LITIGATION, REGULATORY

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[38] In fact as an independent agency, *see* Pet. App. 20a, the EEOC is less susceptible to direct presidential control than most agencies.

DEVELOPMENTS AND NOTEWORTHY CASE DEVELOPMENTS 13 (Jan. 2014) (noting that "a vast majority of EEOC lawsuits are filed during the last two months of the EEOC's fiscal year").[37] At the very least, given their confidential status, it may be more difficult for the Commission to publicize the details of its conciliation successes. *See* EEOC, Significant EEOC Race/Color Cases, http://goo.gl/OSiWOx (identifying Commissions' achievements in combatting race discrimination by listing over 150 litigated cases and three settled by pre-litigation conciliation).

Relatedly, as some courts have noted, filing a lawsuit may also result in greater publicity than a conciliation agreement. *See, e.g.*, *Asplundh*, 340 F.3d at 1261; EEOC, E-RACE Goals and Objectives, ¶ 4, http://goo.gl/82GRO4 (identifying as agency priority, "Increase Media Publicity" by "broaden[ing] its press efforts on race and color discrimination cases"). This is not to accuse the agency of self-aggrandizement. An agency may believe that such publicity has legitimate uses. In this case, for example, the EEOC apparently hoped that by publicizing its suit against petitioner, it would alert other firms to the need to avoid practices with potential for disparate impact.[38]

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[37] *Available at* http://goo.gl/7aPvh1.

[38] Press Release, ACH Mining Sued by EEOC for Sex Discrimination: Federal Agency Asserts That Coal Mine's Failure to Hire Qualified Female Applicants Violated Civil Rights Law (Sept. 27, 2011), http://goo.gl/Lk5mO5 (quoting EEOC attorney as saying "We hope that this case will encourage employers to look at their policies. A policy which results in a

The point is simply that confidential conciliation cannot serve this purpose.

Litigation also holds out the prospect of establishing legal principles that may be helpful to the Commission in other cases or advance the agency's view of best reading of the statute it enforces and sound public policy. *See, e.g.*, EEOC, E-RACE Goals and Objectives, ¶ 3, http://goo.gl/82GRO4 (identifying as agency priority developing "litigation strategies to address" practices causing disparate impact, such as "credit and background checks, arrest and conviction records, employment tests, [and] subjective decision making").

This is not idle speculation. At the end of the day, experience simply has not borne out the Seventh Circuit's optimistic predictions. As amici have shown, even in circuits enforcing the conciliation condition, there are ample examples of the Commission engaging in grossly deficient conciliation efforts. *See* Retail Lit. Ctr. Cert-Stage Br. § I.A.

Those failures do not simply harm employers. They demonstrate that in some instances, the Commission's interests may not be squarely aligned with the individuals on whose behalf it is suing, almost all of whom are most interested in obtaining fair relief for their injuries in the most expeditious way possible. As this Court put it, "the victims of job discrimination want jobs, not lawsuits." *Ford Motor Co. v. EEOC*, 458 U.S. 219, 230 (1982). "Delays in

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work force that looks dramatically different than the applicant pool is a policy worth reconsidering.").

litigation unfortunately are now commonplace, forcing the victims of discrimination to suffer years of underemployment or unemployment before they can obtain a court order awarding them the jobs unlawfully denied them." *Id.* at 228.

This is not, of course, to say that giving short shrift to conciliation is the agency's modus operandi. Just as it is dangerous to generalize about employers' attitude toward conciliation, it would be unfair to assume that all EEOC cases are conducted in the same manner. Conciliation is largely conducted by the agency's more than fifty field offices spread among fifteen regional districts, and the details may be left to the discretion of one or two particular employees.[39] So one would expect variation in particular employees' and offices' approach to conciliation.

But that is precisely why Congress did not leave conciliation up to the agency and its employees. It decided that in the special context of Title VII, it would establish a statutory conciliation obligation and make it a precondition to Commission litigation. There is every reason to expect that Congress would have understood that for that constraint to work as intended, it must be subject to judicial enforcement.

* * * * *

The EEOC rested its motion for summary judgment solely on its claim to be immune from any judicial scrutiny at all. *See* Pet. App. 37a (district

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[39] *See* EEOC Office List and Jurisdictional Map, http://www.eeoc.gov/field/.

court noting that Commission disavowed any attempt to show that its conciliation efforts could survive any applicable standard of review). Because that categorical claim has no merit, this Court should reverse the Seventh Circuit and affirm the district court's denial of the Commission's motion for partial summary judgment.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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RESPONDENT'S BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
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No. 13-1019

In the Supreme Court of the United States

MACH MINING, LLC, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Under federal law, once the Equal Employment Opportunity Commission (Commission) determines that there is reasonable cause to support a charge of an unlawful employment practice, the Commission "shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." 42 U.S.C. 2000e-5(b). Conciliation efforts may not be "made public by the Commission, its officers or employees" and may not be "used as evidence in a subsequent proceeding" unless all "persons concerned" consent. *Ibid.* If the Commission is "unable to secure from the respondent a conciliation agreement acceptable to the Commission," and at least 30 days have elapsed from the filing of the charge, the Commission may bring suit against the respondent in federal district court. 42 U.S.C. 2000e-5(f)(1).

The question presented is whether the Commission's alleged failure to engage in sufficient conciliation efforts is subject to judicial review as an implied affirmative defense to the merits of the Commission's suit.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Discussion 7
Conclusion 19

TABLE OF AUTHORITIES

Cases:

EEOC v. *Agro Distribution, LLC*, 555 F.3d 462 (5th Cir. 2009) 15
EEOC v. *Asplundh Tree Expert Co.*, 340 F.3d 1256 (11th Cir. 2003) 15
EEOC v. *Bruno's Rest.*, 13 F.3d 285 (9th Cir. 1993) 16
EEOC v. *CRST Van Expedited, Inc.*, 679 F.3d 657 (8th Cir. 2012) 16
EEOC v. *Johnson & Higgins, Inc.*, 91 F.3d 1529 (2d Cir. 1996), cert. denied, 522 U.S. 808 (1997) 15
EEOC v. *Keco Indus., Inc.*, 748 F.2d 1097 (6th Cir. 1984) 14
EEOC v. *Klingler Elec. Corp.*, 636 F.2d 104 (5th Cir. 1981) 15, 16
EEOC v. *Pet, Inc., Funsten Nut Div.*, 612 F.2d 1001 (5th Cir. 1980) 15
EEOC v. *Pierce Packing Co.*, 669 F.2d 605 (9th Cir. 1982) 16
EEOC v. *Radiator Specialty Co.*, 610 F.2d 178 (4th Cir. 1979) 14
EEOC v. *Sears, Roebuck & Co.*, 650 F.2d 14 (2d Cir. 1981) 15, 16
EEOC v. *Shell Oil Co.*, 466 U.S. 54 (1984) 19
EEOC v. *Zia Co.*, 582 F.2d 527 (10th Cir. 1978) 14

Cases—Continued: Page

Occidental Life Ins. Co. v. *EEOC*, 432 U.S. 355 (1977) 2
Patterson v. *American Tobacco Co.*, 535 F.2d 257 (4th Cir.), cert. denied, 429 U.S. 920 (1976) 14
United States Postal Serv. v. *Gregory*, 534 U.S. 1 (2001) 12

Statutes:

Administrative Procedure Act, 5 U.S.C. 551 *et seq.* 11
5 U.S.C. 701(a)(2) 11
5 U.S.C. 704 11
Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.* 15
29 U.S.C. 626(b) 17
Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.* 15
42 U.S.C. 12117 17
Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.* ..... *passim*
42 U.S.C. 2000e-5(b) 2, 3, 5, 8, 9, 18
42 U.S.C. 2000e-5(f)(1) 2, 5, 8, 9
42 U.S.C. 2000e-8(e) 9
Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 2
Fair Housing Act, 42 U.S.C. 3610(b)(1) 17
Genetic Information Nondiscrimination Act of 2008, 42 U.S.C. 2000ff-6(a)(1) (Supp. V 2011) 17
2 U.S.C. 437g(a)(4)(A)(i) 17
28 U.S.C. 1292(b) 4

Miscellaneous: Page

EEOC:

All Statutes, FY 1997 - FY 2013, http://www.eeoc.gov/eeoc/statistics/enforcement/all.cfm (last visited May 22, 2014) 12, 13

EEOC Litigation Statistics, FY 1997 through FY 2013, http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm (last visited May 22, 2014) 12, 13

In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 738 F.3d 171. The opinions of the district court denying the Equal Employment Opportunity Commission's motion for summary judgment (Pet. App. 31a-41a) and denying reconsideration and certifying the case for interlocutory review (Pet. App. 42a-55a) are not published in the *Federal Reporter* but are available at 2013 WL 319337 and 2013 WL 2177770.

JURISDICTION

The judgment of the court of appeals was entered on December 20, 2013. A petition for a writ of certiorari was filed on February 25, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103, which amended Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, Congress set out a detailed, multi-step process for the Equal Employment Opportunity Commission (Commission or EEOC) to enforce the statute's prohibition on unlawful employment practices. See *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355, 359 (1977). The process begins when either a person claiming to be aggrieved or a Commission member files a charge of unlawful employment discrimination with the Commission. See 42 U.S.C. 2000e-5(b). The Commission then notifies the respondent of the charge and begins an investigation. *Ibid.* If the Commission determines that there is not reasonable cause to support the charge, it dismisses the charge and promptly notifies the parties. *Ibid.* At that point, the complainant may file his or her own lawsuit. 42 U.S.C. 2000e-5(f)(1).

If the Commission finds reasonable cause to believe that the charge is true, the Commission "shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." 42 U.S.C. 2000e-5(b). If more than 30 days have elapsed from the filing of the charge of employment discrimination and "the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission," the Commission may sue the respondent in federal court. 42 U.S.C. 2000e-5(f)(1). By stating that any conciliation agreement must be "acceptable to the Commission," *ibid.*, Congress gave the Commission

sole discretion to decide whether to settle a charge of unlawful employment discrimination or to bring suit.

Congress mandated that all aspects of the conciliation process be kept confidential: "Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees." 42 U.S.C. 2000e-5(b). And Congress provided criminal penalties for violation of this confidentiality mandate. *Ibid.* (authorizing fine of up to $1000 and imprisonment of up to one year). Further, Congress provided that nothing said or done during the conciliation process may be "used as evidence in a subsequent proceeding without the written consent of the persons concerned." *Ibid.*

2. In 2008, a woman who had unsuccessfully applied for a mining position with petitioner filed a charge of unlawful employment discrimination with the Commission. Pet. App. 3a. She contended that petitioner, which had never hired a woman for a mining position, refused to hire her based on her gender. *Ibid.* The Commission investigated the charge, found reasonable cause to believe petitioner had discriminated against a class of women who applied for mining-related jobs, and invited petitioner to conciliate. *Ibid.* From late 2010 to late 2011, the Commission attempted conciliation with petitioner, but no agreement was reached. *Ibid.*

The Commission then filed this lawsuit, contending that petitioner engaged in a pattern or practice of unlawful employment discrimination and used employment practices that had a disparate impact on female applicants. Pet. App. 31a-32a; Compl. 1-3. In its answer, petitioner asserted a failure-to-conciliate affirmative defense, contending that the complaint

should be dismissed because the Commission had failed to expend sufficient efforts on conciliation. Pet. App. 3a; Answer 3.

The Commission responded that Title VII includes no such failure-to-conciliate affirmative defense, and it moved for partial summary judgment on that basis. Pet. App. 4a. In the meantime, petitioner submitted "extensive discovery requests"—including more than 600 requests for admissions of fact—that "s[ought] information about the EEOC's investigation and conciliation efforts." *Id.* at 3a-4a; see p. 18, *infra*. Petitioner also "slowed discovery on the merits" by objecting to the Commission's merits-related discovery requests on "failure to conciliate" grounds. Pet. App. 4a.

3. The district court denied the Commission's summary-judgment motion. Pet. App. 31a-41a. Relying on precedent from other circuits, the court concluded that it may review the Commission's informal settlement efforts to determine whether the Commission "made a sincere and reasonable effort to negotiate." *Id.* at 34a-36a, 40a (citation and internal quotation marks omitted).

The district court denied the Commission's motion for reconsideration but certified to the court of appeals the questions whether and to what extent the Commission's efforts to informally resolve a charge of discrimination prior to suit are judicially reviewable. Pet. App. 42a-55a; see 28 U.S.C. 1292(b).

4. The court of appeals reversed. Pet. App. 1a-30a. The court concluded, based on the statute's text, the lack of any meaningful standard of review, and the statute's overall scheme and purposes, that "an alleged failure to conciliate is not an affirmative defense

to the merits of a discrimination suit." *Id.* at 2a. In the court's view, if the Commission has "ple[aded] on the face of its complaint that it has complied with all procedures required under Title VII" and the relevant documents (letter of determination and notice of conciliation failure) are "facially sufficient," then no further judicial review is warranted. *Id.* at 30a.

The court of appeals observed that the statute "contains no express provision for an affirmative defense," and it concluded that provisions addressing conciliation "mak[e] clear" that "conciliation is an informal process" that is entrusted to "the EEOC's expert judgment." Pet. App. 5a-6a. The court noted that Congress's directive that the Commission "*endeavor to eliminate*" discrimination using "*informal methods* of conference, conciliation, and persuasion," as well as its statement that any settlement must be "*acceptable to the Commission*," show that Congress intended there to be "deference to agency decision-making." *Id.* at 7a (quoting 42 U.S.C. 2000e-5(b) and (f)(1)). The court further explained that the statute's requirement that "all details of the conciliation" be kept "strictly confidential," along with its prohibition on the use of informal conciliation efforts "as evidence" in a subsequent proceeding, cannot be reconciled with petitioner's proposed affirmative defense, because those provisions expressly preclude consideration of the materials that would be used to establish or disprove that defense. *Ibid.* (citing 42 U.S.C. 2000e-5(b)).

The court of appeals also concluded that Title VII contains "no meaningful standard" for courts to use to evaluate a failure-to-conciliate affirmative defense. Pet. App. 9a-16a (citation omitted). That is so, the

court explained, because the statute provides "open-ended" language about the Commission's duty to informally attempt settlement and gives the Commission "complete discretion to accept or reject an employer's offer." *Id.* at 9a. The court further observed that courts have "varied widely in what evidence they consider and what actions they require of the EEOC," showing that there is no "workable legal standard" for courts to apply to evaluate a failure-to-conciliate affirmative defense. *Id.* at 10a n.2, 16a.

The court of appeals explained that a failure-to-conciliate affirmative defense makes no sense in the broader statutory scheme, because such a defense would "invite[] employers to use the conciliation process to undermine enforcement of Title VII rather than to take the conciliation process seriously as an opportunity to resolve a dispute." Pet. App. 16a. And the result of permitting petitioner's proposed defense would be to "protract and complicate Title VII litigation," with "little or no offsetting benefit" in terms of obtaining voluntary compliance with the law. *Id.* at 17a (citation omitted).

Finally, the court of appeals concluded that an alleged failure to engage in sufficient conciliation efforts is not a "sound basis for dismissing a case on the merits," because "[t]he wrong claimed by [petitioner] here is purely one of insufficient process," and "the remedy for a deficiency in process is more process, not letting one party off the hook entirely." Pet. App. 28a-29a. Dismissal of a Title VII claim on the merits would "excuse the employer's (assumed) unlawful discrimination" and impose the "significant social costs of allowing employment discrimination to go unaddressed." *Id.* at 28a, 30a.

DISCUSSION

Petitioner contends (Pet. 12-21) that this Court should grant certiorari to resolve disagreement in the courts of appeals about whether the Commission's failure to conciliate sufficiently provides an implied affirmative defense in a Title VII lawsuit. The court of appeals correctly held that the informal conciliation process is entrusted to the Commission and that an alleged failure to expend sufficient conciliation efforts is not an affirmative defense to a claim of discrimination under Title VII. The Commission agrees with petitioner, however, that this case presents a recurring question of substantial importance on which the courts of appeals have disagreed. Although the question presented arises here in an interlocutory posture, the question is a purely legal one, and this Court's review is necessary to provide guidance to the Commission and to employers. This Court's review of the question presented therefore is warranted.

1. The court of appeals correctly concluded that the Commission's alleged failure to expend sufficient efforts to resolve informally the charge of discrimination does not provide an implied affirmative defense in a Title VII lawsuit.

a. Petitioner seeks an affirmative defense to liability that appears nowhere in the text of Title VII. That Title VII contains no such defense is itself reason enough not to recognize it. And in the particular context of "a statute as precise, complex, and exhaustive as Title VII," which includes detailed and comprehensive enforcement procedures, this congressional silence is "compelling." Pet. App. 6a (citation omitted).

Moreover, the Title VII provisions that do address informal dispute resolution make clear that Congress

did not intend courts to review the Commission's conciliation efforts. The statute directs the Commission to "endeavor to eliminate" unlawful discrimination through "informal methods of conference, conciliation, and persuasion" before filing suit. 42 U.S.C. 2000e-5(b). The statute does not set out any particular procedures the Commission must follow, leaving it up to the agency to decide which combination of "informal methods" to utilize and how long to pursue conciliation. Congress also entrusted to the agency the decision whether to settle the dispute at all by providing that the Commission may sue if it is "unable to secure * * * a conciliation agreement *acceptable to the Commission*." 42 U.S.C. 2000e-5(f)(1) (emphasis added). These provisions demonstrate that "conciliation is an informal process entrusted solely to the EEOC's expert judgment." Pet. App. 6a. As the court of appeals noted, "[i]t would be difficult for Congress to have packed more deference to agency decision-making into so few lines of text." *Id.* at 7a.

The statute's confidentiality provisions reinforce that Congress did not intend to provide an affirmative defense that would enable courts to review the Commission's informal conciliation efforts. Immediately following the provision directing the Commission to "endeavor to eliminate" discrimination through informal conciliation methods, Congress provided that "[n]othing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned." 42 U.S.C. 2000e-5(b). Congress included no exceptions to the confidentiality mandate, and it barred use of informal conciliation

proceedings as evidence unless all "persons concerned" consent. And Congress underscored the importance of confidentiality by including criminal penalties for "[a]ny person who makes public information in violation of this subsection." *Ibid.*[1]

These provisions refute petitioner's contention that Congress envisioned courts second-guessing the agency's conciliation efforts. As the court of appeals explained, recognizing a failure-to-conciliate affirmative defense would require courts either to respect the statute's confidentiality provisions and "evaluate conciliation without evidence to weigh," or to "construct an implied set of exceptions to the sweeping statutory requirement of confidentiality." Pet. App. 9a. Neither approach is appealing. The court of appeals thus chose appropriately to "stick to the text" and "reject [petitioner's] nonstatutory affirmative defense." *Ibid.*

b. The absence from the statute of any meaningful standard for courts to use to evaluate the Commission's informal dispute-resolution efforts confirms that Congress intended no implied affirmative defense here. As the court of appeals explained, the statute "says nothing about" what steps the Commission must take or how vigorously the Commission must pursue conciliation, and all it says about the substance of settlements is that a conciliation agreement must be "acceptable to the Commission." Pet. App. 9a; 42 U.S.C. 2000e-5(f)(1). By labeling conciliation "informal," by giving the Commission the choice of how to

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[1] The absolute protection for the confidentiality of conciliation matters contrasts with the bar on disclosure of information obtained during Commission investigations, because that bar lasts only until "the institution of any proceeding * * * involving such information," 42 U.S.C. 2000e-8(e).

attempt settlement (conference, conciliation, or persuasion), by ensuring the process remains confidential, and by entrusting the ultimate decision to settle to the agency, Congress has committed the conciliation process to the agency, rather than providing a "judicially reviewable prerequisite to suit." Pet. App. 9a.

Lacking any express guidance from Title VII's text, the courts that have sought nevertheless to evaluate the Commission's settlement efforts understandably "have struggled to provide meaningful guidance on how to judge the process." Pet. App. 27a. The courts of appeals have articulated different standards for reviewing the Commission's conciliation efforts, see pp. 13-16, *infra*, and even courts applying the same formulations have disagreed on the application of those standards. See Pet. App. 25a-27a; see also *id.* at 10a n.2 (providing numerous examples of disagreement in the courts' approaches). The result is that evaluation of the Commission's conciliation process has been left largely to the ad hoc judgments of individual judges. That is no surprise. Crafting a workable standard for reviewing the Commission's efforts is difficult, in large part because "Title VII leaves the choice to settle or not entirely to the EEOC's unreviewable discretion." *Id.* at 12a-13a.

Petitioner concedes (Pet. 26) that Title VII precludes a court from reviewing the Commission's efforts to decide whether "the *substance* of a settlement proposal is satisfactory," but nevertheless contends that courts may evaluate "the *procedural* adequacy of the Commission's conciliation efforts." But the distinction between substance and procedure in this context is elusive at best, and thus, as the court of

appeals noted, reviewing "the conciliation process" "almost inevitably" results in courts' "engag[ing] in a prohibited inquiry into the substantive reasonableness of particular offers." Pet. App. 12a. The inability of courts to develop workable standards, like the absence of any such standards in the text, makes plain that Congress "did not intend for judicial review of conciliation through an implied affirmative defense." *Id.* at 16a.[2]

c. Recognition of an implied failure-to-conciliate affirmative defense also would undermine conciliation. As petitioner acknowledges (Pet. 3, 22-23), Congress preferred that charges of discrimination be resolved informally where possible. Yet petitioner's proposed affirmative defense would have precisely the opposite effect. If the employer knows it may "avoid liability down the road * * * by arguing that the EEOC did not negotiate properly," it has every incentive to thwart the settlement process and to "stockpile exhibits for the coming court battle" rather than to negotiate in good faith with the Commission, especially because "the employer remains free to settle after the EEOC files suit." Pet. App. 17a-18a. As the court of appeals noted, this incentive is greatest in clear cases of employment discrimination: "the stronger the EEOC's case on the merits, the stronger the incentive

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[2] Petitioner does not contend that the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, independently authorizes judicial review of the Commission's conciliation efforts. See Pet. App. 14a. Such an argument would fail in any event because, *inter alia*, the Commission's decision that conciliation has failed is not a "final agency action" within the meaning of 5 U.S.C. 704, and because the decision whether to reach a conciliation agreement is one "committed to agency discretion by law," 5 U.S.C. 701(a)(2).

to use a failure-to-conciliate defense." *Id.* at 18a. The effect would be to "protract and complicate Title VII litigation," shifting the focus from the charge of unlawful discrimination to the collateral question whether the agency did enough to settle the charge before filing suit. *Id.* at 17a (citation omitted).

Petitioner contends (Pet. 35-37) that judicial review is nevertheless necessary to ensure that the Commission undertakes good-faith conciliation efforts. But that is wrong. The Commission takes seriously its obligation to endeavor to informally resolve charges of discrimination, see, *e.g.*, *United States Postal Serv.* v. *Gregory*, 534 U.S. 1, 10 (2001) (noting that "a presumption of regularity attaches to the actions of Government agencies"), and the reality of budget and resource constraints reinforces the Commission's commitment in that regard, providing "powerful incentives to conciliate." Pet. App. 20a. And the Commission's enforcement record establishes that it has been successful in seeking to resolve charges informally. For example, in 2013, the Commission received over 90,000 charges of unlawful discrimination (under all anti-discrimination statutes it enforces), found reasonable cause in 3515 cases, and successfully conciliated in 1437 cases, filing suit on the merits in only 131 cases.[3] Consistent with those figures, the Commission has obtained far greater monetary recovery

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[3] See EEOC, *EEOC Litigation Statistics, FY 1997 through FY 2013*, http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm (*EEOC Litigation Statistics*) (last visited May 22, 2014); EEOC, *All Statutes, FY 1997 - FY 2013*, http://www.eeoc.gov/eeoc/ statistics/enforcement/all.cfm (*All Statutes*) (last visited May 22, 2014).

through non-litigation resolutions than through litigation.[4]

Moreover, a failure-to-conciliate affirmative defense would result in legitimate claims of employment discrimination being dismissed—a remedy that is far too "final and drastic" for the deficiency in process alleged. Pet. App. 28a-30a. As the court of appeals observed, any purported defect in the conciliation process provides no "sound basis for dismissing a case on the merits," because "the remedy for a deficiency in process is more process, not letting one party off the hook entirely." *Id.* at 28a, 29a. Dismissal of a Title VII claim on the merits would "excuse the employer's (assumed) unlawful discrimination" and impose the "significant social costs of allowing employment discrimination to go unaddressed." *Id.* at 28a, 30a. There is, in short, no warrant to develop an extra-statutory failure-to-conciliate affirmative defense to allow employers to avoid liability for employment discrimination.

2. The courts of appeals have disagreed about whether and to what extent courts may review the Commission's alleged failure to engage in sufficient conciliation efforts before filing a Title VII lawsuit. The court of appeals in this case held that courts may not review the Commission's conciliation efforts and that there is no implied failure-to-conciliate affirmative defense for Title VII defendants. Pet. App. 30a. In contrast, the Second, Fourth, Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits have held that courts

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[4] See *EEOC Litigation Statistics* and *All Statutes* (together reporting that in 2013, the Commission obtained $ 372.1 million through non-litigation resolutions, but recovered just $ 38.6 million through litigation).

may inquire into the sufficiency of the Commission's informal conciliation efforts. Those courts' approaches differ on what standard the Commission must meet and whether failure to meet that standard justifies dismissal of a Title VII lawsuit on the merits.

The Fourth, Sixth, and Tenth Circuits, for example, have held that courts may review the sufficiency of the Commission's conciliation efforts to decide if the Commission "ma[de] a good faith effort to conciliate the claim." *EEOC* v. *Keco Indus., Inc.*, 748 F.2d 1097, 1102 (6th Cir. 1984); see *EEOC* v. *Radiator Specialty Co.*, 610 F.2d 178, 183 (4th Cir. 1979); *EEOC* v. *Zia Co.*, 582 F.2d 527, 533-534 (10th Cir. 1978). These courts have varied in describing what effect a finding of insufficient conciliation efforts would have on a Title VII lawsuit. Compare *Patterson* v. *American Tobacco Co.*, 535 F.2d 257, 272 (4th Cir.) (sex-discrimination allegations in the complaint should be dismissed based on a failure to conciliate), cert. denied, 429 U.S. 920 (1976), with *Zia Co.*, 582 F.2d at 533-534 (remedy for insufficient conciliation efforts is additional process). Although these courts have not given much content to their good-faith standard, it is clear that the standard in practice is far from "modest" (Pet. 17).[5]

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[5] See, *e.g.*, *Keco*, 748 F.2d at 1101-1102 (reviewing the terms of a proposed settlement agreement and deciding whether conciliation efforts had sufficiently "broke[n] down"); *Radiator Specialty Co.*, 610 F.2d at 183 (examining all communications between the parties before concluding that the failure to reach agreement "cannot be attributed to the Commission"); *Zia Co.*, 582 F.2d at 531-534 (reviewing the parties' interactions in detail and concluding that the Commission should have "given" the respondent "more time").

The Fifth and Eleventh Circuits have utilized a more searching three-part test for evaluating the sufficiency of the Commission's conciliation efforts. Under that test, the courts ask whether the Commission (1) has sufficiently explained its reasonable cause determination to the employer, (2) has provided the employer with a sufficient opportunity to comply voluntarily, and (3) has responded "in a reasonable and flexible manner to the reasonable attitudes of the employer." *EEOC* v. *Asplundh Tree Expert Co.*, 340 F.3d 1256, 1259 (11th Cir. 2003); *EEOC* v. *Klingler Elec. Corp.*, 636 F.2d 104, 107 (5th Cir. 1981) (per curiam). The Second Circuit has adopted that test in the context of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, which also includes a conciliation provision. See *EEOC* v. *Johnson & Higgins, Inc.*, 91 F.3d 1529, 1534 (2d Cir. 1996), cert. denied, 522 U.S. 808 (1997).[6] The courts that apply this test have authorized dismissal of discrimination lawsuits on the merits when the courts deem the Commission's conciliation efforts unsatisfactory.[7]

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[6] See also *EEOC* v. *Sears, Roebuck & Co.*, 650 F.2d 14, 18-19 (2d Cir. 1981) (in the Title VII context, stating the Commission "must make a genuine effort to conciliate with respect to each and every employment practice complained of" and "must afford a fair opportunity to discuss" the challenged practices (citation and internal quotation marks omitted)).

[7] See, *e.g.*, *Asplundh Tree Expert Co.*, 340 F.3d at 1261; *Sears, Roebuck & Co.*, 650 F.2d at 19; see also *EEOC* v. *Agro Distribution, LLC*, 555 F.3d 462, 469 (5th Cir. 2009) (stating that "dismissal" would be an "appropriate sanction" in the context of a lawsuit under the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.*); but see also *EEOC* v. *Pet, Inc., Funsten Nut Div.*, 612 F.2d 1001, 1002-1003 (5th Cir. 1980) (per curiam) (stating that

And the three-part test has proven to be quite probing.[8]

Petitioner also cites (Pet. 14) cases from the Eighth and Ninth Circuits. The Eighth Circuit has affirmed the dismissal of a complaint based on the conclusion that the Commission's investigation and conciliation efforts were insufficient, but it did not clearly articulate the standard for scrutinizing the Commission's actions. See *EEOC* v. *CRST Van Expedited, Inc.*, 679 F.3d 657, 676-677 (8th Cir. 2012). The Ninth Circuit has not addressed whether Title VII includes an implied failure-to-conciliate affirmative defense; the cited cases (Pet. 14) say only that "failure to conciliate can be a basis for awarding attorney's fees to a defendant in a Title VII case." *EEOC* v. *Bruno's Rest.*, 13 F.3d 285, 288-289 (9th Cir. 1993); see *EEOC* v. *Pierce Packing Co.*, 669 F.2d 605, 608-609 (9th Cir. 1982) (similar).[9]

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appropriate response to insufficient conciliation efforts in a Title VII case is to stay the litigation to permit additional negotiations).

[8] See, *e.g.*, *Sears, Roebuck & Co.*, 650 F.2d at 17-19 (although the Commission attempted conciliation for 14 months, with 28 meetings between the parties and "extensive correspondence," court affirmed dismissal of the lawsuit because the Commission sought a conciliation agreement that was nationwide in scope, but sued regarding discrimination at only two stores); *Klingler Elec. Corp.*, 636 F.2d at 107 (calling for a "thorough inquiry" into the terms of the proposed settlement agreement; the "materiality of the information" the employer proposed to add to the agreement; "the history of negotiations"; and "the nature of the EEOC's counterproposal and [the employer's] response" in order to judge "the reasonableness and responsiveness of the EEOC's conduct under all the circumstances").

[9] The question whether courts may review the Commission's conciliation efforts in a Title VII case is presented in a pending case in the Ninth Circuit. See *EEOC* v. *The Geo Grp., Inc.*, No. 13-

The disagreement in the circuits on this issue is unlikely to be resolved without this Court's intervention. The court below circulated its opinion to all active Seventh Circuit judges, and no judge called for en banc review of the decision. Pet. App. 25a n.3. The approaches in the other circuits are longstanding. Accordingly, there is disagreement in the circuits warranting this Court's review.

3. Resolution of the question whether Title VII includes an implied failure-to-conciliate affirmative defense will have significant consequences for the enforcement of Title VII and other laws. Congress has directed the Commission to attempt conciliation before filing suit not only under Title VII, but also under the ADEA, see 29 U.S.C. 626(b), the Americans with Disabilities Act of 1990, see 42 U.S.C. 12117 (incorporating Title VII procedures), and the Genetic Information Nondiscrimination Act of 2008, see 42 U.S.C. 2000ff-6(a)(1) (Supp. V 2011) (incorporating Title VII procedures). Other statutes containing conciliation requirements also may be affected by resolution of the question presented. See 2 U.S.C. 437g(a)(4)(A)(i) (federal election law); 42 U.S.C. 3610(b)(1) (Fair Housing Act).

The disagreement in the circuits has placed the Commission in an untenable position. The Commission is statutorily required to endeavor to resolve disputes through informal conference, conciliation, and persuasion. Yet the wide variety in the courts' approaches makes it increasingly difficult for the agency to ensure that its informal efforts are sufficiently robust to avoid dismissal of meritorious law-

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16292 (9th Cir.) (opening brief and answering brief have been filed; reply brief is due on June 18, 2014).

suits on failure-to-conciliate grounds, and conciliation itself has become more protracted, resource-intensive, and time consuming. Further, in many circuits the agency is forced to choose between following Congress's mandate that everything "said or done" during the conciliation process be kept confidential and may not be used as evidence "in any subsequent proceeding" (42 U.S.C. 2000e-5(b)) and responding to an employer's failure-to-conciliate defense by disclosing its efforts to conciliate.

Moreover, the recognition of an implied failure-to-conciliate affirmative defense has created incentives for employers to treat conciliation not as a means to resolve disputes voluntarily, but as an opportunity to develop an affirmative defense for litigation. Numerous employers have challenged the adequacy of the Commission's conciliation efforts, and these challenges have led to substantial collateral litigation that is wholly unrelated to the merits of the underlying employment-discrimination lawsuits. In this case, for example, petitioner spent two years seeking extensive discovery about the Commission's investigation and conciliation efforts. Pet. App. 3a. It submitted 696 requests for admissions of fact, 645 of which related to the Commission's investigation or conciliation, Pet. First Reqs. for Admis. 1-5 & Attachs. 1-44 (June 27, 2012) (Docket entry No. 25), and it objected to merits-based discovery based on the Commission's "asserted failure to conciliate." Pet. App. 3a-4a; see Mot. for Partial Summ. J. Ex. E, at 3, 5-12 & Ex. F, at 2-20 (July 30, 2012) (Docket entry No. 32). The implied failure-to-conciliate affirmative defense has become "a potent weapon in the hands of employers who have no interest in complying voluntarily with the Act, who

wish instead to delay [litigation] as long as possible." *EEOC* v. *Shell Oil Co.*, 466 U.S. 54, 66-67, 81 (1984) (discussing notice requirement). This Court should grant certiorari and hold that there is no implied failure-to-conciliate affirmative defense under Title VII.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 2014

RESPONDENT'S BRIEF

RECORD
AND
BRIEFS

SUPREME COURT, U.S.
OCT 27 2014
OFFICE OF THE CLERK

No. 13-1019

In the Supreme Court of the United States

MACH MINING, LLC, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Under federal law, once the Equal Employment Opportunity Commission (Commission) investigates a charge of unlawful employment discrimination and determines that there is reasonable cause to support the charge, the Commission "shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." 42 U.S.C. 2000e-5(b). "Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees" or be "used as evidence in a subsequent proceeding" unless all "persons concerned" consent. *Ibid.* If the Commission is "unable to secure from the respondent a conciliation agreement acceptable to the Commission," and at least 30 days have elapsed from the filing of the charge, the Commission may bring suit against the respondent in federal district court. 42 U.S.C. 2000e-5(f)(1).

The question presented is whether the Commission's alleged failure to engage in sufficient conciliation efforts is subject to judicial review and provides a basis for dismissal of the Commission's suit on the merits.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statutory and regulatory provisions involved 2
Statement 2
Summary of argument 8
Argument:
In a Title VII lawsuit, the court may not review the sufficiency of the EEOC's pre-suit conciliation efforts 12
A. The plain language of Title VII demonstrates that Congress did not intend review of the EEOC's conciliation efforts 12
B. The Commission's duty to attempt conciliation does not make the conciliation process judicially reviewable 19
C. Foundational principles of administrative law reinforce the conclusion that Congress did not intend judicial review of the Commission's conciliation efforts 32
D. Judicial review of the Commission's conciliation efforts would undermine effective enforcement of Title VII 39
E. Petitioner's proposed judicial review is unworkable and unwise 48
Conclusion 55
Appendix — Statutory and regulatory provisions 1a

TABLE OF AUTHORITIES

Cases:

Alexander v. *Gardner-Denver Co.*, 415 U.S. 36 (1974) 34
Baldwin Cnty. Welcome Ctr. v. *Brown*, 466 U.S. 147 (1984) 25
Bennett v. *Spear*, 520 U.S. 154 (1997) 33

Cases—Continued: Page

Block v. *Community Nutrition Inst.*, 467 U.S. 340 (1984) 39
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EEOC v. *Agro Distrib., LLC*, 555 F.3d 462 (5th Cir. 2009) 50
EEOC v. *Allegheny Airlines*, 436 F. Supp. 1300 (W.D. Pa. 1977) 53
EEOC v. *AMX Commc'ns, Ltd.*, No. 09-CV-2483, 2011 WL 3555831 (D. Md. Aug. 8, 2011) 45
EEOC v. *Asplundh Tree Expert Co.*, 340 F.3d 1256 (11th Cir. 2003) 41, 49
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EEOC v. *Braun Elec. Co.*, No. 12-CV-01592, 2014 WL 1330566 (E.D. Cal. Apr. 2, 2014) 44
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Cases—Continued: Page

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EEOC v. *IPS Indus., Inc.*, 899 F. Supp. 2d 507 (N.D. Miss. 2012) 44
EEOC v. *JBS USA, LLC*, 940 F. Supp. 2d 949 (D. Neb. 2013) 44
EEOC v. *Keco Indus., Inc.*, 748 F.2d 1097 (6th Cir. 1984) 49
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Cases—Continued: Page

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EEOC v. *New Prime, Inc.*, No. 11-CV-03367, 2014 WL 4060305 (W.D. Mo. Aug. 14, 2014) 44
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EEOC v. *Pet, Inc., Funsten Nut Div.*, 612 F.2d 1001 (5th Cir. 1980) 50
EEOC v. *Phillip Servs. Corp.*, 635 F.3d 164 (5th Cir. 2011) 27
EEOC v. *Pierce Packing Co.*, 669 F.2d 605 (9th Cir. 1982) 46
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Cases—Continued: Page

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EEOC v. *Ruby Tuesday, Inc.*, 919 F. Supp. 2d 587 (W.D. Pa. 2013) 44, 50
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EEOC v. *Spoa, LLC*, No. 13-CV-1615, 2014 WL 47337 (D. Md. Jan. 3, 2014) 44
EEOC v. *Sterling Jewelers, Inc.*, 3 F. Supp. 3d 57 (W.D.N.Y. 2014) 42
EEOC v. *Swissport Fueling, Inc.*, 916 F. Supp. 2d 1005 (D. Ariz. 2013) 44, 50
EEOC v. *United States Steel Corp.*, No. 10-1284, 2012 WL 150799 (W.D. Pa. Apr. 5, 2012) 51
EEOC v. *United States Steel Corp.*, No. 10-12, 2013 WL 625315 (W.D. Pa. Feb. 20, 2013) 44
EEOC v. *Unit Drilling Co.*, No. 13-CV-147, 2014 WL 2211011 (N.D. Okla. May 28, 2014) 44
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EEOC v. *Zia Co.*, 582 F.2d 527 (10th Cir. 1978) 49
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Florida Power & Light Co. v. *Lorion*, 470 U.S. 729 (1985) 54
Fort Sumter Tours, Inc. v. *Babbitt*, 202 F.3d 349 (D.C. Cir. 2000) 16
Franklin v. *Massachusetts*, 505 U.S. 788 (1992) 33
General Tel. Co. of the Nw., Inc. v. *EEOC*, 446 U.S. 318 (1980) 54
Hardin v. *Straub*, 490 U.S. 536 (1989) 42
Heckler v. *Chaney*, 470 U.S. 821 (1985) 32, 35, 36
Lincoln v. *Vigil*, 508 U.S. 182 (1993) 37
McDonnell Douglas Corp. v. *Green*, 411 U.S. 792 (1973) 25, 27
Miller v. *International Paper Co.*, 408 F.2d 283 (5th Cir. 1969) 30, 43
National Archives & Records Admin. v. *Favish*, 541 U.S. 157 (2004) 46
National R.R. Passenger Corp. v. *Morgan*, 536 U.S. 101 (2002) 25
Norton v. *Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004) 10, 33, 35, 36, 42
Occidental Life Ins. Co. v. *EEOC*, 432 U.S. 355 (1977) 2, 12, 31
Patterson v. *American Tobacco Co.*, 535 F.2d 257 (4th Cir.), cert. denied, 429 U.S. 920 (1976) 53
Ricci v. *DeStefano*, 557 U.S. 557 (2009) 39

Cases—Continued: Page

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Webster v. *Doe*, 486 U.S. 592 (1988) 37
Zipes v. *Trans World Airlines, Inc.*, 455 U.S. 385 (1982) 25

Statutes, regulations and rule:

Administrative Procedure Act, 5 U.S.C. 551 *et seq.* 10
5 U.S.C. 551(13) 33
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5 U.S.C. 704 32
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§ 706(a), 78 Stat. 259 ....29, 30
§ 706(e), 78 Stat. 260 30
Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 2
sec. 4(a), § 706(b), 86 Stat. 104 ....30, 31
sec. 4(a), § 706(f)(1), 86 Stat. 105 ....30, 31
National Labor Relations Act, 29 U.S.C. 151 *et seq.* 38
29 U.S.C. 158(d) 38
7 U.S.C. 2276(b)(2)(B) 27
10 U.S.C. 613a(b)(2)-(3) 27
13 U.S.C. 9(a) 27
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28 U.S.C. 1292(b) 6

Statutes, regulations and rule—Continued: Page

42 U.S.C. 2000e-5 ..... 1a
42 U.S.C. 2000e-5(b) ..... *passim*
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42 U.S.C. 2000e-6 ..... 20, 47
42 U.S.C. 2000e-6(a) 20
42 U.S.C. 2000e-8(e) 28
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43 U.S.C. 1782(c) 35
29 C.F.R.:
Sections 1601.6-1601.24 38
Section 1601.12(a)(3) 23
Section 1601.21(b) 20
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Section 1601.25 ..... 20, 14a
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Fed. R. Evid. 408 28

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In the Supreme Court of the United States

No. 13-1019

MACH MINING, LLC, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 738 F.3d 171. The opinions of the district court denying the Equal Employment Opportunity Commission's motion for summary judgment (Pet. App. 31a-41a) and denying reconsideration and certifying the case for interlocutory review (Pet. App. 42a-55a) are not published in the *Federal Supplement* but are available at 2013 WL 319337 and 2013 WL 2177770.

JURISDICTION

The court of appeals entered its judgment on December 20, 2013. A petition for a writ of certiorari was filed on February 25, 2014, and was granted on June 30, 2014. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant statutory and regulatory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-15a.

STATEMENT

1. In the Equal Employment Opportunity Act of 1972 (EEO Act), Pub. L. No. 92-261, 86 Stat. 103, which amended Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, Congress set out a detailed, multi-step process for the Equal Employment Opportunity Commission (Commission or EEOC) to enforce the statute's prohibition on unlawful employment practices. See *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355, 359 (1977). The process begins when either a person claiming to be aggrieved or a Commission member files a charge of unlawful employment discrimination with the Commission. See 42 U.S.C. 2000e-5(b). The Commission then notifies the respondent of the charge and begins an investigation. *Ibid.* If the Commission determines that there is not reasonable cause to support the charge, it dismisses the charge and promptly notifies the parties. *Ibid.* At that point, the complainant may file his or her own lawsuit. 42 U.S.C. 2000e-5(f)(1).

If the Commission finds reasonable cause to believe the charge is true, the Commission "shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." 42 U.S.C. 2000e-5(b). The statute leaves to the Commission the ultimate decision whether to enter into a conciliation agreement or to sue. If more than 30 days have elapsed from the filing of the charge of employment discrimination and "the Com-

mission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission," the Commission may sue the respondent in federal court. 42 U.S.C. 2000e-5(f)(1).[1]

Congress mandated that all aspects of the conciliation process be kept confidential: "Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees." 42 U.S.C. 2000e-5(b). Further, Congress provided that nothing said or done during the conciliation process may be "used as evidence in a subsequent proceeding without the written consent of the persons concerned." *Ibid.* Congress provided criminal penalties for violation of these confidentiality provisions. *Ibid.* (authorizing fine of up to $1000 and imprisonment of up to one year).

2. In 2008, a woman who had unsuccessfully applied for a mining position with petitioner filed a charge of unlawful employment discrimination with the Commission. Pet. App. 3a. She contended that petitioner, which had never hired a woman for a mining position, refused to hire her based on her gender. *Id.* at 3a, 31a-32a. The Commission investigated the charge and found reasonable cause to believe petitioner had discriminated against a class of women who applied for mining-related jobs. *Id.* at 3a.

In its letter notifying petitioner of the reasonable-cause finding, the Commission invited petitioner to conciliate. Pet. App. 3a; see J.A. 14-17. The letter stated that a Commission representative would contact petitioner to begin the conciliation process and

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[1] Different procedures apply for suits against government respondents, see 42 U.S.C. 2000e-5(c), (d) and (f); those procedures are not at issue here.

encouraged petitioner to raise any questions it had about the process. J.A. 16-17.

From September 2010 to September 2011, the Commission attempted conciliation with petitioner, but no agreement was reached. Pet. App. 3a. Accordingly, the Commission sent petitioner a letter stating that, with respect to the specific charge at issue, "conciliation efforts as are required by law have occurred and have been unsuccessful." J.A. 18-19.

The Commission then filed this lawsuit, contending that petitioner engaged in a pattern or practice of unlawful employment discrimination and used employment practices that had a disparate impact on female applicants. Pet. App. 31a-32a; J.A. 20-25. The complaint alleged that "[a]ll conditions precedent to the institution of this lawsuit have been fulfilled." J.A. 22. In its answer, petitioner asserted as an affirmative defense that the complaint should be dismissed because the Commission had failed to expend sufficient efforts on conciliation. Pet. App. 3a, 32a; J.A. 30.

The Commission sought partial summary judgment on the ground that Title VII precludes judicial review of the sufficiency of the Commission's conciliation efforts. Pet. App. 2a, 32a; Summ. J. Mot. 1 (July 30, 2012) (Docket entry No. 32). To confirm that conciliation occurred, the Commission provided both its letter inviting petitioner to conciliate and its letter stating that conciliation had failed. Summ. J. Mot. Exs. 6 (notice of reasonable-cause determination) (J.A. 14-17), C (notice of conciliation failure) (J.A. 18-19).

Petitioner responded that the court must review the *sufficiency* of the Commission's conciliation efforts. Petitioner listed numerous questions the court should ask about the Commission's motives, process,

and offers, and it urged the court to order discovery so the court could build a "full record" of what happened during conciliation and decide if the Commission "respond[ed] in a reasonable and flexible manner to the reasonable attitudes of [petitioner]." Def.'s Mem. in Opp. to Summ. J. Mot. 5-20 (Oct. 18, 2012) (Docket entry No. 42) (Def.'s Summ. J. Br.). Petitioner then submitted "extensive discovery requests"—including more than 600 requests for admissions of fact (15 requests to each of 43 different people)—that "s[ought] information about the EEOC's investigation and conciliation efforts." Pet. App. 3a-4a, 54a n.1; see J.A. 44, 47-59. Petitioner also "slowed discovery on the merits" by objecting to the Commission's merits-related discovery requests on "failure to conciliate" grounds. Pet. App. 4a.

3. The district court denied the Commission's summary-judgment motion. Pet. App. 31a-41a. Relying on precedent from other circuits, the court concluded that it may review the Commission's conciliation efforts to determine whether the Commission "made a sincere and reasonable effort to negotiate." *Id.* at 34a-36a, 40a (citation and internal quotation marks omitted).

The court also denied the Commission's request to keep the details of conciliation confidential. Pet. App. 40a. The Commission had moved to strike portions of petitioner's summary-judgment brief that made representations about what happened during the conciliation process on the ground that Title VII mandates confidentiality. *Ibid.* (citing 42 U.S.C. 2000e-5(b)). The court rejected that request, concluding that it was required to review what happened during conciliation

to judge the sufficiency of the Commission's efforts. *Ibid.*

The district court denied the Commission's motion for reconsideration but certified to the court of appeals the question whether and under what standard courts may review the EEOC's "informal efforts to secure a conciliation agreement acceptable to the EEOC before filing suit." Pet. App. 42a-55a; see 28 U.S.C. 1292(b).

4. The court of appeals reversed. Pet. App. 1a-30a. The court concluded that "an alleged failure to conciliate" cannot support dismissal of a discrimination suit on the merits. *Id.* at 2a. Because the Commission "ple[aded] on the face of its complaint that it has complied with all procedures required under Title VII" and the documents the Commission sent to petitioner (notice of reasonable-cause determination and notice of conciliation failure) are "facially sufficient" to show that conciliation occurred, no further review is warranted. *Id.* at 3a, 30a.

The court of appeals first observed that Title VII's "express statutory language mak[es] clear that conciliation is an informal process" that is "entrusted solely to the EEOC's expert judgment" and must "remain confidential." Pet. App. 5a-6a. The court explained that the words Congress chose are "significant": by stating that the Commission should "*endeavor to eliminate*" discrimination using "*informal methods* of conference, conciliation, and persuasion," and that any conciliation agreement must be "*acceptable to the Commission*," Congress committed the conciliation process to the Commission's discretion. *Id.* at 7a (quoting 42 U.S.C. 2000e-5(b) and (f)(1)).

The court further explained that Title VII's requirement that "all details of the conciliation" be kept "strictly confidential," along with its prohibition on the use of informal conciliation efforts "as evidence" in a subsequent proceeding, cannot be reconciled with judicial review of the conciliation process. Pet. App. 7a (citing 42 U.S.C. 2000e-5(b)). Courts either would have to "evaluate conciliation without evidence to weigh" or "construct an implied set of exceptions to the sweeping statutory requirement of confidentiality." *Id.* at 9a.

The court of appeals also concluded that Title VII contains no "meaningful standard" for courts to use to evaluate the sufficiency of the Commission's conciliation efforts. Pet. App. 9a-16a. The court explained that the statute provides "open-ended" language about the Commission's duty to informally attempt conciliation and gives the Commission "complete discretion to accept or reject an employer's offer." *Id.* at 9a. The court observed that experience in the courts of appeals that have allowed sufficiency review has confirmed that there is no "workable legal standard" for courts to apply. *Id.* at 10a n.2, 16a. And the court explained that the lack of any meaningful standard to review the Commission's process shows it is "committed to agency discretion by law." *Id.* at 13a-16a.

The court of appeals recognized that permitting judicial review of conciliation efforts would "invite[] employers to use the conciliation process to undermine enforcement of Title VII rather than to take the conciliation process seriously as an opportunity to resolve a dispute." Pet. App. 16a. Inquiring into the conciliation process, the court explained, would "protract and complicate Title VII litigation," with "little or no off-

setting benefit" in terms of obtaining voluntary compliance with the law. *Id.* at 17a (citation omitted). And "the stronger the EEOC's case on the merits, the stronger the incentive to use a failure-to-conciliate defense." *Id.* at 18a.

Finally, the court of appeals concluded that an alleged failure to engage in sufficient conciliation efforts is not a "sound basis for dismissing a case on the merits," because "[t]he wrong claimed * * * is purely one of insufficient process," and "the remedy for a deficiency in a process is more process, not letting one party off the hook entirely." Pet. App. 28a-29a. Dismissal of a Title VII claim with prejudice would impose the "significant social costs of allowing employment discrimination to go unaddressed." *Id.* at 28a.

SUMMARY OF ARGUMENT

In a Title VII lawsuit, a court may not review the sufficiency of the EEOC's pre-suit conciliation efforts.

A. The statutory text establishes that Congress did not intend to permit review of the EEOC's conciliation efforts. Title VII directs the Commission, prior to filing suit, to "endeavor to eliminate" employment discrimination through various "informal methods," 42 U.S.C. 2000e-5(b), and states that the Commission may bring suit if it is unable to secure an agreement "acceptable to the Commission" through conciliation, 42 U.S.C. 2000e-5(f)(1).

The EEOC's duty is to "endeavor" to persuade an employer to voluntarily comply with the law, and Congress did not specify any particular process the agency must use to accomplish that goal. Instead, Congress left it to the Commission to decide which "informal methods" of "conference, conciliation, and persuasion" would be appropriate. Congress also en-

trusted the ultimate decision whether to enter into a conciliation agreement exclusively to the Commission, which strongly suggests that the process leading up to that decision also is committed to the agency's discretion. And Congress provided that "nothing said or done" during conciliation may be "made public" by the Commission or "used as evidence in a subsequent proceeding" absent written consent. That broad confidentiality mandate is incompatible with judicial review of the conciliation process.

B. The Commission agrees that it has a duty to attempt conciliation before bringing an employment-discrimination suit under 42 U.S.C. 2000e-5. The Commission's practice is to invite an employer to conciliate when it issues a reasonable-cause determination and to send a notice to the employer when conciliation fails to yield an acceptable agreement. If challenged in court, the EEOC will provide those two documents (which preserve the confidentiality of the conciliation process) to show that it fulfilled its statutory duty. The court of appeals correctly recognized that nothing more is required.

Petitioner is wrong to assert that the Commission must undergo a searching review of its conciliation efforts before it may seek to prove discrimination in court. In *EEOC* v. *Shell Oil Co.*, 466 U.S. 54 (1984), this Court refused to look behind a facially valid charge of discrimination to assess the sufficiency of the information supporting the charge and to second-guess the EEOC's notice process. The Court should do the same here: facially valid documents establish that the EEOC attempted conciliation as required by statute. Petitioner's attempt to convert a simple condition precedent into a searching judicial inquiry is

not only incompatible with this Court's guidance about conditions precedent to suit, but also is at odds with the statute's confidentiality provisions and the statute's history.

C. Background principles governing judicial review of agency action reinforce that Congress intended no review here. Although this is not a case brought under the Administrative Procedure Act (APA), 5U.S.C. 551 *et seq.*, the APA is instructive because it embodies longstanding principles of judicial review. The Commission's informal conciliation process would not qualify as final agency action under the APA because it is not a discrete decision or action that marks the culmination of the agency's decisionmaking process. Indeed, even the agency's determination that conciliation has failed is not a final agency action—it is a step in the process leading to the court's determination of whether unlawful discrimination has occurred.

Petitioner could not obtain judicial review under the APA to force the EEOC to take certain actions during conciliation, because a failure to act is only remediable when the agency failed to undertake a specific act the law requires, *Norton* v. *Southern Utah Wilderness Alliance*, 542 U.S. 55, 62 (2004), and Title VII does not require the EEOC to take any particular actions other than to "endeavor" to conciliate. Moreover, by deciding not to prescribe standards for judging the sufficiency of the Commission's conciliation efforts, by requiring conciliation to be kept confidential, and by entrusting the ultimate decision whether conciliation has succeeded to the Commission, Congress made clear that the conciliation process is committed to agency discretion by law.

D. Judicial review of the adequacy of the Commission's conciliation efforts undermines the effective enforcement of Title VII. Employers that believe litigation is likely will have an incentive to treat every communication during conciliation as a potential exhibit supporting their eventual inadequate-conciliation argument, rather than as a genuine opportunity for dialogue. Further, both employers and the EEOC will be less open and willing to negotiate if they know that their communications will not remain confidential and can be used to their detriment at trial. And once the EEOC has filed suit, employers have every incentive to raise inadequate-conciliation arguments. The result is to burden the courts with mini-trials on a collateral issue and delay (and sometimes entirely avoid) adjudication of the merits. Experience has demonstrated that employers view the inadequate-conciliation argument as a "potent weapon" in Title VII suits, *Shell Oil*, 466 U.S. at 81, and will use that weapon to obtain discovery, delay, and dismissal.

Judicial review is not necessary to ensure the Commission conciliates in good faith. The Commission has "powerful incentives to conciliate," and it has a long history of doing so successfully in many cases. Pet. App. 20a.

E. The judicial review petitioner proposes is unworkable and unwise. Although several courts of appeals have authorized judicial review of conciliation efforts, they have been unable to formulate any workable standard, and the result is that individual judges decide the sufficiency of conciliation on an ad hoc basis. This creates substantial uncertainty for the EEOC, which never knows if its informal conciliation efforts will someday be found insufficient.

Petitioner proposes a variety of factors to judge the sufficiency of the EEOC's conciliation efforts, but those factors are no more help than the indeterminate standards articulated by the courts of appeals. Moreover, petitioner's proposed judicial review is intrusive, imposing burdens on the EEOC to provide certain information, conciliate for a certain time, and negotiate in a certain way—even though there is no basis in the statutory text for any such rules.

As unworkable and unwise as petitioner's proposed review is on its own, petitioner's remedy makes it worse. Dismissal of a Title VII lawsuit on the merits is far too drastic a remedy for a deficiency in the conciliation process. The remedy for lack of process is more process. For all of these reasons, the judgment of the court of appeals should be affirmed.

ARGUMENT

IN A TITLE VII LAWSUIT, THE COURT MAY NOT REVIEW THE SUFFICIENCY OF THE EEOC'S PRE-SUIT CONCILIATION EFFORTS

A. The Plain Language Of Title VII Demonstrates That Congress Did Not Intend Review Of The EEOC's Conciliation Efforts

1. Title VII sets out an "integrated, multistep enforcement procedure" for the Commission to bring an employment-discrimination lawsuit. *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355, 359 (1977). When a charge of unlawful employment discrimination is filed with the Commission, the Commission provides the employer with notice of the charge and investigates the charge. 42 U.S.C. 2000e-5(b). If the Commission determines that there is reasonable cause to believe the charge is true, then Title VII directs it to attempt

to informally conciliate the charge before filing suit against the employer. *Ibid.*

Three key provisions of Title VII address the conciliation process. First, the statute directs the Commission to seek voluntary compliance before bringing a lawsuit: When the Commission finds reasonable cause to believe the charge of employment discrimination, "the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." 42 U.S.C. 2000e-5(b). Second, Title VII requires that all aspects of the conciliation process be kept confidential: "Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned." *Ibid.* The statute includes criminal penalties for violation of that prohibition, stating that "[a]ny person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both." *Ibid.* Third, Title VII entrusts to the Commission's discretion the ultimate decision whether to informally resolve a charge of employment discrimination and on what terms: the Commission may sue an employer for unlawful discrimination if 30 days have elapsed since the filing of the charge and "the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission." 42 U.S.C. 2000e-5(f)(1).

Taken together, these provisions make clear that although the Commission must attempt conciliation, courts may not review the sufficiency of the agency's informal conciliation process.

2. The obligation Congress placed on the Commission is to "endeavor" to eliminate unlawful employment discrimination through "informal" methods. 42 U.S.C. 2000e-5(b). "Endeavor" means to "attempt" or "try." See, *e.g.*, *American Heritage College Dictionary* 462 (4th ed. 2010) (*American Heritage Dictionary*) ("[t]o attempt (fulfillment of a responsibility, for example) by employment or expenditure of effort"); *Black's Law Dictionary* 607 (9th ed. 2009) ("[t]o exert physical or intellectual strength toward the attainment of an object or goal"); *Webster's Third New International Dictionary of the English Language* 748 (1993) (*Webster's*) (to "try" or "to work with set purpose" or "make an effort"). By directing the Commission to "endeavor" to eliminate unlawful discrimination, Congress simply told the agency to try to resolve claims of employment discrimination informally prior to filing suit.

The Commission's duty is to try to "eliminate [the employer's] unlawful employment practice." 42 U.S.C. 2000e-5(b). Congress did not direct the Commission to resolve the charge of discrimination and avoid litigation at any cost; rather, it directed the Commission to seek a resolution that *eliminates* the employer's unlawful discrimination. "Congress was focused on effective enforcement of the anti-discrimination standards of Title VII, not creating new rights for employers." Pet. App. 19a. And the statute gives the Commission the authority to decide what resolution would be sufficient to "eliminate" the unlawful discrimination. See 42 U.S.C. 2000e-5(f)(1) (conciliation agreement must be "acceptable to the Commission").

Congress did not specify any particular processes the Commission must use in conciliation, instead leaving it to the Commission to use "informal" methods such as "conference, conciliation, and persuasion." 42 U.S.C. 2000e-5(b). Congress's repeated use of the word "informal" to describe the Commission's conciliation "endeavors" shows that Congress did not intend to prescribe rules the Commission must follow in the conciliation process. See, *e.g.*, *American Heritage Dictionary* 712 ("informal" means "[n]ot being in accord with prescribed regulations or forms"); *Webster's* 1160 ("informal" means "conducted or carried out without formal, regularly prescribed, or ceremonious procedure").

Further, the three "informal methods" Congress identified—"conference, conciliation, and persuasion"—provide the Commission with substantial discretion about how to urge an employer to stop its illegal practices. See, *e.g.*, *American Heritage Dictionary* 299 ("conference" is ("[a] meeting for consultation or discussion" or "[a]n exchange of views"); *id.* at 297 ("conciliate" is "[t]o make or try to make compatible; reconcile"); *id.* at 1039 ("persuade" is "[t]o induce to undertake a course of action or embrace a point of view by means of argument, reasoning, or entreaty"). Congress did not specify that the Commission must "negotiate" or "bargain" with an employer, nor did Congress specify any discrete steps the Commission must take in attempting to informally resolve the charge. See pp. 38-39, *infra* (contrasting Title VII with collective-bargaining statute). Rather, by using the subjective, open-ended terms "conference," "conciliation," and "persuasion," Congress left

it to the Commission to make its own judgment about how best to obtain voluntary compliance.

3. It is undisputed that the Commission's ultimate decision whether to enter into a conciliation agreement or sue is unreviewable. See Pet. Br. 10, 24; Pet. App. 9a, 12a-13a. Congress's statement that the Commission may sue if it is "unable to secure * * * a conciliation agreement *acceptable to the Commission*," 42 U.S.C. 2000e-5(f)(1) (emphasis added), entrusts to the Commission the decision whether to resolve a charge of employment discrimination through conciliation and on what terms. Title VII provides "no description of what a negotiated settlement should look like," Pet. App. 9a, and the EEOC "is free to refuse an offer that might appear fair or even generous to a neutral observer," *id.* at 12a. Because the decision whether to enter into a conciliation agreement is entrusted to the Commission's sole discretion, it is not judicially reviewable. And the unreviewability of the Commission's ultimate decision strongly suggests that Congress did not expect courts to inquire into the adequacy of the agency's process leading up to that decision. See, *e.g.*, *Fort Sumter Tours, Inc.* v. *Babbitt*, 202 F.3d 349, 356-357 (D.C. Cir. 2000) (when National Park Service's letter denying reconsideration was nonreviewable, court did not look behind the letter to judge the adequacy of the agency's process).

Petitioner argues (Br. 25-26) that a court foreclosed by statute from reviewing the "substance" of the Commission's conciliation efforts can nevertheless review the Commission's "procedure." But that distinction is illusory. As the court of appeals explained, "[a] court reviewing whether the agency negotiated in

good faith would almost inevitably find itself engaged in a prohibited inquiry into the substantive reasonableness of particular offers." Pet. App. 12a; see pp. 51-53, *infra* (addressing the intrusiveness of petitioner's proposed review).

Moreover, the text commits the process as well as the ultimate decision to the agency's discretion. Congress provided in the text no standards by which to judge the Commission's conciliation process. See *EEOC* v. *Shell Oil Co.*, 466 U.S. 54, 72 n.26 (1984) (rejecting assumption that a court should review whether EEOC charge of discrimination was well-founded because "[n]othing in the statute" provides a basis for that assumption). And the ordinary meaning of the words Congress chose to describe that process—"endeavor" to eliminate discrimination, using "informal" methods such as "conference, conciliation, and persuasion," and seek an agreement "acceptable to the Commission"—are infused with informality and discretion. The statutory language addressing the conciliation process is "an instruction to the EEOC to try, by whatever methods of persuasion it chooses short of litigation, to secure an agreement that the agency in its sole discretion finds acceptable." Pet. App. 7a. As the court of appeals correctly noted, "[i]t would be difficult for Congress to have packed more deference to agency decisionmaking into so few lines of text." *Ibid.*[2]

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[2] Petitioner also suggests (Br. 30) that the provision authorizing a court to grant a stay in a Title VII suit indicates an intention to permit judicial review of the pre-suit conciliation process. But the provision that "[u]pon request," a court, in its discretion, may stay proceedings for up to 60 days to permit "efforts of the Commission to obtain voluntary compliance," 42 U.S.C. 2000e-5(f)(1), does not

4. Title VII's confidentiality provisions reinforce that Congress did not authorize judicial review of the sufficiency of the Commission's informal conciliation efforts. Immediately after directing the Commission to "endeavor to eliminate" discrimination through informal conciliation methods, Congress mandated a broad protection for the confidentiality of the conciliation process. This provision prohibits the Commission from making public anything "said or done during and as a part of" the conciliation process, 42 U.S.C. 2000e-5(b), and it precludes anyone from using anything "said or done" during conciliation "as evidence" in court unless all "persons concerned" provide "written consent." *Ibid.* Congress used comprehensive language to describe the information that must be kept confidential—anything "said or done during and as a part of" the Commission's "informal endeavors." Further, by coupling the prohibition on public disclosure with a prohibition on use of the information in a proceeding (such as a Title VII case), Congress prescribed restrictions that cover any circumstances in which the information might be disclosed. Congress's statement that the information could be used as evidence only when all "persons concerned"—the EEOC, the employer, and the complainant—provide "*written* consent," *ibid.*, demonstrates that Congress expected such disclosures to be rare.[3] And Congress under-

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require the court to judge the sufficiency of the Commission's prior conciliation efforts. Courts routinely grant stays to permit settlement talks without delving into the details of the parties' prior settlement efforts.

[3] "Persons concerned" includes not only the employer and the Commission, but also the victims of discrimination. See *EEOC* v. *Associated Dry Goods Corp.*, 449 U.S. 590, 599-600 (1981).

scored the importance of confidentiality by including criminal penalties for making information about conciliation public. *Ibid.*

The broad non-disclosure requirement is fundamentally incompatible with judicial review of the sufficiency of the EEOC's conciliation process. As the court of appeals explained, inquiring into the sufficiency of conciliation would require courts either to respect the statute's confidentiality provisions and "evaluate conciliation without evidence to weigh," or to "construct an implied set of exceptions to the sweeping statutory requirement of confidentiality." Pet. App. 9a. The court of appeals appropriately chose to "stick to the text." *Ibid.*

If Congress had intended to authorize searching review of the Commission's conciliation efforts, it would have said so. Pet. App. 5a-6a. But Congress gave no hint that it expected such review; to the contrary, it defined the agency's obligation using discretion-granting terms and committed the ultimate decision to the agency's discretion. In the context of "a statute as precise, complex, and exhaustive as Title VII," which includes detailed and comprehensive enforcement procedures, the court of appeals appropriately declined to erect new procedural hurdles to suit that appear nowhere in the statute's text. *Id.* at 6a (citation omitted).

B. The Commission's Duty To Attempt Conciliation Does Not Make The Conciliation Process Judicially Reviewable

1. Petitioner's principal contention (Br. 18-22) is that courts may review the sufficiency of the Commission's conciliation efforts because conciliation is a condition precedent to the Commission's filing suit. The

Commission does not dispute that it has a duty to attempt conciliation of a charge of discrimination before filing a Title VII lawsuit under 42 U.S.C. 2000e-5. But all that is required is for the Commission to establish that it has attempted conciliation in an effort to obtain a resolution acceptable to the Commission.

Title VII provides that the Commission "shall endeavor to eliminate" unlawful employment discrimination informally before bringing suit. 42 U.S.C. 2000e-5(b). That mandatory language places a duty on the Commission to seek informal resolution of a charge before bringing a lawsuit. See, *e.g.*, *United States* v. *Montalvo-Murillo*, 495 U.S. 711, 718-719 (1990) (the word "shall" generally implies a mandatory duty).[4]

When the Commission finds reasonable cause to support a charge of unlawful employment discrimination, the Commission invites the employer to conciliate. The Commission's practice is to include an invitation to conciliate in its letter advising an employer that it has reasonable cause to believe that the employer engaged in unlawful employment practices. See EEOC, *EEOC Compliance Manual*, § 40.4(e) (June 2006), available at 2006 WL 4673170; see also 29 C.F.R. 1601.21(b) (reasonable-cause notification). When the Commission determines that conciliation will not lead to an acceptable resolution of the charge, the Commission's practice, embodied in a regulation, is to send another letter to the employer notifying it of the failure of conciliation. 29 C.F.R. 1601.25 (stating that if the EEOC "is unable to obtain voluntary compliance" through conciliation and "determines that

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[4] The duty to attempt conciliation does not apply in a case involving a pattern or practice of employment discrimination under 42 U.S.C. 2000e-6. See 42 U.S.C. 2000e-6(a).

further efforts to do so would be futile or counterproductive," it shall "notify the respondent in writing"). Those two documents are the "bookends" of the conciliation process; they show that the Commission has attempted conciliation, but they do not reveal any details of what happened during conciliation.

When the Commission brings a Title VII lawsuit and an employer contends that the Commission failed to fulfill its duty to seek to resolve the matter by conciliation, the court may check to ensure that the Commission attempted conciliation by reviewing those two letters. In this case, for example, the Commission pleaded in the complaint that it had satisfied all preconditions to suit, J.A. 22, and petitioner sought dismissal on failure-to-conciliate grounds, J.A. 30. The Commission then sought summary judgment on the issue and provided to the court its letter inviting petitioner to conciliate (J.A. 14-17) and the letter it sent approximately one year later noting that conciliation had failed to yield an acceptable agreement (J.A. 18-19).[5] There is "no challenge here to the facial sufficiency of these documents" that show conciliation occurred. Pet. App. 3a; see Pet. Br. 5-6 (no dispute that conciliation failed). Those documents establish that the Commission "endeavor[ed] to eliminate" petitioner's unlawful employment discrimination, 42 U.S.C. 2000e-5(b), but that the Commission was "unable to secure from the respondent a conciliation

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[5] The Commission can file those two letters while respecting the statute's confidentiality mandate because the letters do not disclose things "said or done during and as a part of" the EEOC's conciliation efforts, 42 U.S.C. 2000e-5(b); they simply disclose that conciliation was attempted and failed to yield an agreement acceptable to the EEOC.

agreement acceptable to the Commission," 42 U.S.C. 2000e-5(f)(1).

Once the EEOC establishes that it has attempted conciliation, nothing more is required. That makes sense, because all the Commission seeks is a chance to get into court to prove its case on the merits. The court of appeals therefore correctly held that, "[i]f the EEOC has ple[aded] on the face of its complaint that it has complied with all procedures required under Title VII and the relevant documents are facially sufficient," no further review is warranted. Pet. App. 30a (citing *Shell Oil*, 466 U.S. at 81).

2. Petitioner asks the Court to require a searching review of the Commission's conciliation efforts, where courts would scrutinize the Commission's communications, offers, and negotiations. See Pet. Br. 36-41, 45, 51; see also pp. 51-53, *infra*. But this Court's decisions addressing the preconditions for a Title VII lawsuit refute the notion that the EEOC must satisfy such a heavy burden simply to have a chance to prove discrimination in court.[6]

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[6] Petitioner contends (Br. 17, 21-22) that the court of appeals erred by referring to its inadequate-conciliation argument as an "affirmative defense," rather than a "condition precedent" to suit. This argument is beside the point. The district court and the court of appeals called petitioner's argument an "affirmative defense" (Pet. App. 2a, 3a, 7a, 9a, 19a, 31a, 32a, 43a) because petitioner designated it as one in its answer (J.A. 30), and because if the argument is successful, it would allow an employer to avoid liability even if the EEOC made out a case of discrimination on the merits (see Pet. App. 29a; *Black's Law Dictionary* 482 (definition of "affirmative defense")). Regardless of how it is characterized, petitioner's argument is simply not one supported by Title VII's text.

EEOC v. *Shell Oil Co.*, *supra*, is particularly instructive. *Shell Oil* addressed the question whether a charge filed by a member of the EEOC was sufficient to trigger a Title VII investigation. 466 U.S. at 56. If the charge was valid, then a subpoena issued by the EEOC during its investigation was enforceable. *Id.* at 65. The Court held that a charge is valid if it complies with the "minimal requirements" expressly set out in the statute and regulations—that the charge be "in writing under oath or affirmation," and "contain such information and be in such form as the Commission requires" by regulation, 42 U.S.C. 2000e-5(b), including a statement of "the facts * * * constituting the alleged unlawful employment practices," 29 C.F.R. 1601.12(a)(3). *Shell Oil*, 466 U.S. at 67. The Court then reviewed the charge at issue and concluded, from the face of the charge, that the charge included all of the necessary information. *Id.* at 67-74.

Significantly, the Court declined the employer's invitation to go further and look behind the charge to determine whether it was supported by a sufficient factual basis. The employer argued that the charge was "not supportable by the facts" and the EEOC must "answer[] a series of questions regarding the basis of the charge" and "furnish[] information substantiating its answers." *Shell Oil*, 466 U.S. at 57-58. The Court disagreed, stating that courts should not "determine whether the charge of discrimination is 'well founded' or 'verifiable'" because nothing in the statute supports such a requirement. *Id.* at 72 n.26 ("[A]ny effort by the court to assess the likelihood that the Commission would be able to prove the claims made in the charge would be reversible error."). The Court also rejected the employer's related argument

that the EEOC must provide the evidence underlying the charge when it sends the employer notice of the charge. *Id.* at 81. The Court explained that an insufficient-notice argument would be a "potent weapon in the hands of employers" who wish to delay adjudication of the merits and would require district courts to adjudicate collateral questions about whether the EEOC's notice was sufficient before the EEOC could even investigate. *Ibid.*

The reasoning of *Shell Oil* applies here. Title VII requires the Commission to attempt conciliation, and the letters the Commission sends to begin and end conciliation show, on their face, that the Commission has fulfilled its duty. Nothing in Title VII requires the EEOC's conciliation efforts to meet a sufficiency standard, just as nothing in the statute requires the EEOC to prove the validity of a charge or establish the sufficiency of its notice before it can investigate. In both cases, a sufficiency argument would be a "potent weapon" for employers to use to "delay as long as possible" the investigation and adjudication of the charge of employment discrimination. *Shell Oil*, 466 U.S. at 81. And in both cases, inquiring into sufficiency would require significant collateral litigation that would burden the district courts and be unjustified at such a preliminary stage of the case. *Ibid.* Thus here, as in *Shell Oil*, the agency's burden is met when it provides facially adequate documentation to establish that it fulfilled its statutory duty.

3. None of the other pre-suit requirements petitioner cites (Br. 18-21) involve the type of searching judicial review petitioner proposes for pre-suit conciliation. These requirements generally are specific, discrete requirements that courts can check have been

satisfied at the outset of a suit. For example, a private party must file a charge with the EEOC within 180 or 300 days of the alleged unlawful employment practice to bring suit to remedy that practice. See, *e.g.*, *National R.R. Passenger Corp.* v. *Morgan*, 536 U.S. 101, 104-105, 114-115 (2002); *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982); *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553, 555 n.4 (1977). Similarly, a person who has received a right-to-sue letter and wishes to bring a Title VII suit must do so within 90 days. *Baldwin Cnty. Welcome Ctr.* v. *Brown*, 466 U.S. 147, 149-150 (1984) (per curiam); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 798 (1973). The stated deadlines are clear, and courts routinely enforce these provisions without extensive collateral proceedings.

Yet in petitioner's view, before the EEOC even is allowed a chance to prove a charge of discrimination in court, the court must conduct a mini-trial to determine whether the Commission's conciliation efforts were sufficient. Petitioner has identified no other pre-suit requirement that either places such a burden on EEOC before it may proceed in court or involves such a searching inquiry and uses such an amorphous standard. See pp. 51-53, *infra* (describing petitioner's proposed standard). The fact that petitioner's approach imposes a precondition to a Title VII suit unlike any other is good reason to reject it.

4. Petitioner's effort (Br. 26-21) to reconcile its proposal for searching review of the conciliation process with the statute's confidentiality provisions is unavailing.

Petitioner asserts (Br. 26-28), for example, that when Congress mandated that "[n]othing said or

done" during conciliation be "made public" or "used as evidence in a subsequent proceeding" without consent, it meant to allow judicial review of the Commission's informal conciliation efforts under seal. But in our justice system, openness—not sealing—is the norm. It is thus difficult to believe that Congress, without any indication in the text, intended a regime that would require the parties in every Title VII action brought by the Commission to litigate the adequacy of the Commission's conciliation efforts under seal, complete with protective orders and decisions sealed from public view. Moreover, petitioner's "under seal" solution is not an easy one; as the court of appeals noted, the case law on how to litigate such matters while maintaining confidentiality is "scattered and inconsistent." Pet. App. 8a n.1. The uncertainty has acute consequences, because Title VII's confidentiality mandate is backed up by criminal penalties. See 42 U.S.C. 2000e-5(b).

Moreover, the sealed proceedings petitioner envisions are incompatible with the command that "[n]othing said or done during and as a part of [the EEOC's] informal endeavors" may be used "as evidence in a subsequent proceeding" without written consent of all persons concerned. Petitioner's only response (Br. 27-28) is that the word "evidence" means "information used to prove a claim on the merits." But that is not its ordinary meaning; "evidence" is anything "that tends to prove or disprove the existence of an alleged fact" in court. *Black's Law Dictionary* 635; Bryan A. Garner, *Garner's Modern American Usage* 322 (2d ed. 2003) ("evidence" "includes all means by which a fact in issue is established or disproved"). A court uses "evidence" to decide

preliminary questions in a case just as it uses evidence to decide the ultimate merits of a plaintiff's claim.[7] Petitioner relies (Br. 27-28) on statutes that prohibit the use of information "as evidence" or "for any purpose" in a judicial, legislative, or administrative proceeding. 42 U.S.C. 3789g(a); see 7 U.S.C. 2276(b)(2)(B); 10 U.S.C. 613a(b)(2)-(3); 13 U.S.C. 9(a); 15 U.S.C. 281a; 42 U.S.C. 10708(b). But the broader formulation makes sense in those statutes because the prohibition applies to legislative and administrative proceedings in addition to litigation.[8]

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[7] Petitioner's narrow interpretation of "evidence" also is incompatible with its assertion (Br. 9, 22) that the Commission must prove adequate conciliation as an "element" of its claim of unlawful discrimination. If conciliation were an element of a Title VII claim (which it is not, see, *e.g.*, *Green*, 411 U.S. at 802), then surely the information used to establish it would be "evidence."

Petitioner also suggests (Br. 28-29) that, because only private parties (not the EEOC) could sue before 1972, and the confidentiality provisions were in place then, the only possible use of conciliation information as "evidence" then was to prove the merits in a private suit. But before 1972, employers did attempt to use conciliation information for other purposes in private suits, see p. 30, *supra*; Pet Br. 28-29, and nothing in the 1964 or 1972 legislative records suggests that "evidence" meant anything other than its broad, ordinary meaning.

[8] In *EEOC* v. *Phillip Services Corp.*, 635 F.3d 164 (5th Cir. 2011), the EEOC sought to introduce evidence from conciliation to establish that an employer breached an oral conciliation agreement. *Id.* at 165. The EEOC argued that such evidence could be admitted because the evidence was not being used to prove or disprove the merits of a Title VII charge. *Id.* at 165-166. The court of appeals disagreed and affirmed dismissal of the breach-of-contract suit. *Id.* at 166. The Commission now agrees the prohibition on use of conciliation matters as "evidence" is not limited to their use to prove or disprove the merits of a charge.

If Congress had wanted to permit use of conciliation materials in some court proceedings, it would have said so. For example, although Title VII bars disclosure of information obtained during Commission investigations, that bar lasts only until "the institution of any proceeding * * * involving such information." 42 U.S.C. 2000e-8(e). Similarly, Federal Rule of Evidence 408, which generally precludes admission of settlement offers and negotiations, includes exceptions allowing that evidence to be used for purposes such as "proving a witness's bias or prejudice" or "proving an effort to obstruct a criminal investigation or prosecution." Fed. R. Evid. 408; see Pet. App. 8a. Title VII's confidentiality provisions include no similar exceptions or limitations.

Petitioner is thus left to suggest (Br. 29-30) that the confidentiality of conciliation should be "deemed waived" whenever an employer challenges the adequacy of conciliation. An employer's decision to make such an argument may mean that it is willing to consent to disclosure of conciliation matters, but that does not mean the Commission or the charging party consents. The statute provides no exception for a "deemed waiver," and its requirement that all concerned persons consent in writing refute the notion that a waiver may be implied. 42 U.S.C. 2000e-5(b). In any event, the Court should not presume that a defendant challenging the Commission's conciliation efforts is willing to waive the confidentiality protections; petitioner refused to do so in this very case.[9]

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[9] In district court, the Commission argued that petitioner had waived confidentiality by raising an inadequate-conciliation defense, J.A. 36, but petitioner resisted that argument, J.A. 37-38, and attempted to limit the materials the Commission could use to

Here, Congress's goal was to protect the confidentiality of conciliation talks so the parties could communicate openly without fear that doing so would prejudice them in litigation. See *EEOC* v. *Associated Dry Goods Corp.*, 449 U.S. 590, 599 n.16 (1981). As the court of appeals recognized, judicial review of the Commission's conciliation efforts subverts that goal.

5. The statutory history further supports the view that Congress never intended review of the sufficiency of the Commission's conciliation efforts to be a key part of a Title VII suit. As originally enacted, Title VII authorized the Commission to investigate a charge of discrimination and to attempt to resolve the charge by conciliation but it did not authorize the Commission to enforce the statute. See *Shell Oil*, 466 U.S. at 77-78; see H.R. Rep. No. 238, 92d Cong., 1st Sess. 2 (1971) (under the 1964 Act, "the Commission is * * * limited essentially to the function of conciliation") (1971 House Report). In 1964, the statute stated that if the Commission finds reasonable cause to support the charge, "the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(a), 78 Stat. 259. The statute contained confidentiality provisions similar to those in

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respond to the defense, see Def.'s Opp. to Mot. to Deem Confidentiality Waived 4 (June 11, 2012) (Docket entry No. 23). Petitioner then recounted some selected details of conciliation to argue that conciliation was inadequate. See Def.'s Summ. J. Br. 17-20. When the Commission moved to strike these statements, petitioner asserted that it "is not prohibited from submitting information from conciliation," but also that it "ha[d] not waived confidentiality" by doing so. Def.'s Mem. in Opp. to Mot. to Strike 1, 4 (Nov. 13, 2012) (Docket entry No. 49).

place today, *ibid.*, and provided that, if "the Commission has been unable to obtain voluntary compliance with this title" and at least 30 days have passed since the filing of the charge, the Commission shall notify the charging party and the charging party may sue, § 706(e), 78 Stat. 260.

Congress amended Title VII in 1972 to give the Commission the authority to enforce Title VII through litigation. *Shell Oil*, 466 U.S. at 77; see, *e.g.*, 1971 House Report 4, 9 (result of EEOC's "limited authority" in the 1964 Act was that it could not obtain conciliation in most of the cases in which it had found reasonable cause). These amendments provided the EEOC with litigation authority while maintaining the core conciliation and confidentiality provisions. EEO Act sec. 4(a), § 706(b) and (f)(1), 86 Stat. 104, 105.

Nothing in the 1972 amendments suggests an intention to make conciliation a key issue in Title VII suits or provide employers with new rights to a certain conciliation process. The 1972 House Conference Report stated that, after finding reasonable cause to support a charge, the Commission shall "attempt conciliation in conformity with the requirements of existing law." H.R. Conf. Rep. No. 899, 92d Cong., 2d Sess. 17 (1972) (1972 Conf. Report). But under existing law, conciliation had not been subject to judicial review. See 118 Cong. Rec. 3805-3806 (1972) (statement of Sen. Ervin); see also *Miller* v. *International Paper Co.*, 408 F.2d 283, 289 & n.24 (5th Cir. 1969) (holding that conciliation was not a precondition to a private suit and noting that "a deluge of cases has already considered and rejected the company's argument"). And if Congress had intended to authorize review of informal conciliation efforts, it should be

expected to have spoken clearly in light of the long legal tradition that courts do *not* review behavior during settlement negotiations. See, *e.g.*, 2 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 4:56, at 122-124 (3d ed. 2007).

The changes that Congress made to Title VII in 1972 are all consistent with continuing the existing regime of non-reviewability. Congress reiterated the informality of the conciliation process by amending the statute to provide that "[n]othing said or done as a part of such *informal* endeavors may be made public." EEO Act sec. 4(a), § 706(b), 86 Stat. 104 (emphasis added), and it added language permitting the Commission to sue when it "has been unable to secure from the respondent a conciliation agreement acceptable to" it, sec. 4(a), § 706(f)(1), 86 Stat. 105. Accordingly, nothing in the 1972 legislative record indicates that Congress expected searching review of the Commission's conciliation efforts at the behest of an employer, rather than simply a check to ensure there was an opportunity for the Commission to resolve the matter by conciliation.[10]

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[10] A debated issue in 1972 was whether the EEOC should have cease-and-desist authority or litigation authority. See *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355, 361-362 (1977). The original House and Senate bills provided that the Commission could bring an administrative enforcement action if it was unable to secure "a conciliation agreement acceptable to the Commission and to the person aggrieved, which determination shall not be reviewable in any court." H.R. 1746, 92d Cong., 1st Sess. sec. 4, § 706(f) (as introduced in the House, Jan. 22, 1971); see S. 2515, 92d Cong., 1st Sess. sec. 4(a), § 706(f) (as introduced in the Senate, Sept. 14, 1971) (similar language). As part of the amendments in both the House and Senate that removed administrative enforcement authority and added litigating authority, the "shall not be reviewable in any

C. Foundational Principles Of Administrative Law Reinforce The Conclusion That Congress Did Not Intend Judicial Review Of The Commission's Conciliation Efforts

1. Petitioner invokes (Br. 17) the presumption of judicial review of agency action to support its contention that courts should review the Commission's conciliation process. But an agency's conciliation process is not the type of agency action presumptively subject to judicial review.

Under basic principles of administrative law, the Commission's conciliation process is not reviewable because it is not final agency action. The APA is instructive in this regard, because although this is not an APA suit, the APA is generally understood to have codified existing principles of judicial review. See, *e.g.*, *Heckler* v. *Chaney*, 470 U.S. 821, 832 (1985). The APA generally authorizes review only of "final agency action." 5 U.S.C. 704.[11] An "agency action" "includes

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court" language was removed. H.R. 9247, 92d Cong., 1st Sess. § 3(a) and (c) (as introduced in the House, June 17, 1971); S. Amend. No. 884, 92d Cong., 2d Sess. (1972); see 1972 Conf. Report 17. Amicus National Retail Litigation Center asserts (Br. 28-29) that the removal of that language shows that Congress intended judicial oversight of EEOC conciliations. That is incorrect. First, the change was made because of competing proposals about what type of enforcement authority to give the EEOC, not competing proposals about judicial review. Second, the language about reviewability referred to the ultimate determination that conciliation has failed, not the sufficiency of the EEOC's process. Third, the final bill retained the language providing that the conciliation agreement just be "acceptable to the Commission," and all agree that the language makes the Commission's ultimate decision unreviewable.

[11] The APA also authorizes judicial review of an "[a]gency action made reviewable by statute," 5 U.S.C. 704, but petitioner does not

the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. 551(13). An agency action is "final" if it "mark[s] the consummation of the agency's decisionmaking process," and it is a decision "by which rights or obligations have been determined or from which legal consequences will flow." *Bennett* v. *Spear*, 520 U.S. 154, 177-178 (1997) (internal quotation marks and citations omitted). The "core question" is "whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." *Franklin* v. *Massachusetts*, 505 U.S. 788, 797 (1992).

Under these principles, it is clear that the Commission's conciliation process is not a final agency action. As an initial matter, the Commission's informal communications, negotiations, and other efforts are not the type of "circumscribed, discrete" actions, made on an administrative record, that typically qualify as "agency action." *Norton* v. *Southern Utah Wilderness Alliance*, 542 U.S. 55, 62 (2004); see also, *e.g.*, *Franklin*, 505 U.S. at 796 (census report is an "unusual candidate" to be considered "agency action" because it was not "promulgated to the public in the Federal Register" and "no official administrative record is generated").

Moreover, the Commission's conciliation efforts are not "final" agency actions because they do not reflect the culmination of the agency's decisionmaking—they are part of the process leading up to a decision. Even the result of these informal endeavors—the agency's decision that conciliation has not produced an ac-

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contend that Title VII itself provides for judicial review of the Commission's conciliation process.

ceptable agreement—is not a "final" agency action because it does not finally determine an employer's rights. The EEOC has no authority to adjudicate claims or impose administrative sanctions, see *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974), and the Commission's conclusion that further conciliation efforts are unwarranted does not have "the status of law" so that "immediate compliance with [its] terms [i]s expected," *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 239-240 (1980) (internal quotation marks and citation omitted). Rather, the agency's decision that conciliation has not yielded an acceptable agreement is a step in the process by which a *court* determines the parties' rights. The decision to sue is a "determination only that adjudicatory proceedings will commence," and the potential that the employer will have to defend itself in court does not make it aggrieved within the meaning of the APA. *Standard Oil*, 449 U.S. at 241-242; see 5 U.S.C. 702 (cause of action for person "adversely affected or aggrieved by agency action within the meaning of the relevant statute"). Just as an agency's filing of an administrative complaint is not a final agency action, *Standard Oil*, 449 U.S. at 244, the EEOC's decision to sue in court also is not a final agency action. And here, petitioner challenges not the EEOC's conclusion that conciliation has failed to yield an acceptable agreement but the process leading up to that conclusion.

2. Nor would the Commission's conciliation efforts be reviewable as a challenge to the agency's failure to act. Cf. Pet. Br. 36-41 (suggesting that the EEOC should have taken additional steps during conciliation). A failure to act is remediable under the APA only if the plaintiff "asserts that an agency failed to

take a *discrete* agency action that it is *required to take*." *Southern Utah Wilderness Alliance*, 542 U.S. at 64. This rule reflects the "traditional practice" prior to the APA that judicial review to compel agency action was limited to situations where a statute contained "a specific, unequivocal command." *Id.* at 63 (citation omitted). Accordingly, when a plaintiff seeks judicial review to address an agency's failure to act, "the presumption is that judicial review is *not* available." *Chaney*, 470 U.S. at 831 (emphasis added).

This Court has previously rejected attempts to require agency action to comply with a general statutory directive. In *Norton* v. *Southern Utah Wilderness Alliance*, *supra*, the plaintiffs sought to compel the Bureau of Land Management to take action to protect public lands from damage caused by off-road vehicles. 542 U.S. at 60. The relevant statute directed the Bureau to "continue to manage" the public lands "in a manner so as not to impair the suitability of such areas for preservation as wilderness." *Id.* at 65 (quoting 43 U.S.C. 1782(c)). Because that statute is "mandatory as to the object to be achieved," but "leaves [the Bureau] with a great deal of discretion in deciding how to achieve it," this Court held that courts may not oversee the process by which the Bureau complies with the statutory directive. *Id.* at 66-67. "If courts were empowered to enter general orders compelling compliance with broad statutory mandates," the Court explained, it would impermissibly require the "supervising court, rather than the agency, to work out compliance with the broad statutory mandate" on a case-by-case basis. *Id.* at 66.

So too here. Title VII provides a "broad statutory mandate[]" (*Southern Utah Wilderness Alliance*, 542

U.S. at 66) to the EEOC to "endeavor to eliminate" the employer's unlawful practices through "informal methods," 42 U.S.C. 2000e-5(b), but otherwise leaves it to the agency to decide how to best carry out that duty. Requiring a court to review the agency's process to judge compliance with that mandate case-by-case would usurp the agency's role and burden the courts with "day-to-day * * * management" (*Southern Utah Wilderness Alliance*, 542 U.S. at 67) of the EEOC's conciliation efforts. Nothing in Title VII "legally *require[s]*" the Commission to take specific steps during conciliation, *id.* at 63, and so the Court should not command the agency to take such steps.

3. The absence from Title VII of any meaningful standard for courts to use in evaluating the Commission's conciliation efforts confirms that Congress intended no such review. Agency action is not judicially reviewable if "no judicially manageable standards are available for judging how and when an agency should exercise its discretion." *Chaney*, 470 U.S. at 830. When there are no such standards for reviewing agency action, the agency's decision is "committed to agency discretion by law" and judicial review is foreclosed. *Id.* at 829-830 (citing 5 U.S.C. 701(a)(2); emphasis omitted).

That is the case here: Title VII includes no standard for judging the sufficiency of the EEOC's conciliation efforts. The statute directs the Commission to "endeavor" to eliminate discrimination through "informal methods" of "conference, conciliation, and persuasion," 42 U.S.C. 2000e-5(b), but it says nothing about what steps the Commission must take and how vigorously the Commission must pursue conciliation—

other than that any conciliation agreement must be "acceptable to the Commission," 42 U.S.C. 2000e-5(f)(1). By labeling conciliation "informal," by giving the Commission the choice of how to attempt to achieve voluntary compliance (conference, conciliation, or persuasion), by requiring the process to remain confidential, and by entrusting to the agency the ultimate decision about whether conciliation has produced an acceptable outcome, Congress has committed the conciliation process to the agency rather than providing a "judicially reviewable prerequisite to suit." Pet. App. 9a; see *id.* at 14a.

The question of how to persuade an employer to comply with Title VII is the kind of question traditionally left to agency discretion, because it depends on many variables, including the agency's judgment about where its "resources are best spent." *Lincoln* v. *Vigil*, 508 U.S. 182, 193 (1993) (citation omitted). And Congress's decision to permit the EEOC to sue when it determines that no agreement acceptable to it has been reached strongly suggests that the process leading up to that decision is unreviewable. See, *e.g.*, *Webster* v. *Doe*, 486 U.S. 592, 594, 601 (1988) (CIA director's authority to terminate an employee in his or her sole discretion made termination unreviewable).

Petitioner seeks to address the absence of meaningful standards for judicial review by noting that some courts have made up rules (Br. 25-26); by proposing its own set of rules (Br. 36-41); and by suggesting (Br. 35) that the EEOC could promulgate regulations to provide standards. But the point is that *Congress* has not supplied a standard for judicial review. Any effort by judges or petitioner to fill that gap and formalize the "informal" process that Congress in-

tended is an appropriation of the lawmaking function, as there is no congressional guidance to light the way.[12]

Petitioner also suggests (Br. 36) that courts can develop standards for judicial review of conciliation efforts because they review collective bargaining under the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.* But unlike Title VII, the NLRA places numerous specific duties on employers and unions, including the duty to "bargain collectively," which requires "meet[ing] at reasonable times and confer[ring] in good faith with respect to wages, hours, and other terms and conditions of employment," "negotiat[ing] * * * an agreement," and "execut[ing] * * * a written contract incorporating any agreement reached." 29 U.S.C. 158(d). Further, the collective bargaining process is not required

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[12] Petitioner's suggestion (Br. 35) that the EEOC "provide more detailed content to the conciliation obligation" so that courts may review it presumes that the EEOC's conciliation efforts are judicially reviewable, which they are not. The EEOC has appropriately decided not to promulgate regulations requiring a specific process for its own internal, confidential, and informal efforts. The EEOC has promulgated procedural regulations under Title VII to provide guidance to charging parties about how to contact the EEOC and initiate charges and to explain to charging parties and respondents what steps the Commission will then take. See 29 C.F.R. 1601.6-1601.24. The EEOC has not issued detailed regulations addressing conciliation, however, because the manner in which the Commission seeks to bring about voluntary compliance depends on the facts of each case and on the relief the Commission believes is necessary to eliminate the unlawful practice. The Commission has delegated decisionmaking authority over conciliation to the District Directors, 29 C.F.R. 1601.24(b), so that the individuals most familiar with each case can determine how best to persuade an employer to stop its unlawful practices.

to be kept confidential, see, *e.g.*, *Carey Salt Co.* v. *NLRB*, 736 F.3d 405, 411-412 (5th Cir. 2013), unlike conciliation under Title VII, see 42 U.S.C. 2000e-5(b). And as the court of appeals recognized (Pet. App. 11a), the task of reviewing labor negotiations has not been an easy one for the federal courts. See *Carey Salt Co.*, 736 F.3d at 411-430.

Not only does the statute fail to contain any standards for judging conciliation, but it includes language that indicates that Congress did not intend such review. The language committing the ultimate conciliation decision to the agency, combined with the statute's confidentiality provisions, make this a situation where the statute itself "preclude[s] judicial review." 5 U.S.C. 701(a)(1); see *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 345-346, 349 (1984) (whether a statute precludes review depends on the statutory text, statutory scheme as a whole, legislative history, and tradition).

Accordingly, even if the Commission's conciliation efforts are considered "final agency action" to which a presumption of judicial review applies, that presumption is overcome by Congress's failure to provide any standards for judging the sufficiency of the efforts and the statutory language that demonstrates an intention to preclude judicial review.

D. Judicial Review Of The Commission's Conciliation Efforts Would Undermine Effective Enforcement Of Title VII

1. "[V]oluntary compliance" is "the preferred means of achieving the objectives of Title VII" of preventing and remedying unlawful employment discrimination. *Ricci* v. *DeStefano*, 557 U.S. 557, 581 (2009) (citation omitted). Judicial review of conciliа-

tion reduces employers' incentives to conciliate in good faith and increases their incentives to raise inadequate-conciliation arguments to delay (and perhaps entirely avoid) adjudication of a charge of unlawful employment discrimination.

Judicial review of conciliation undermines the purposes of Title VII in several ways. First, in cases where litigation is likely, the employer's "incentive to reach an agreement" through conciliation will be outweighed by "the incentive to stockpile exhibits for the coming court battle." Pet. App. 17a. If an employer knows that it may "avoid liability down the road * * * by arguing that the EEOC did not negotiate properly," it will view every communication with the agency as a potential exhibit in the later litigation, rather than as an opportunity for open communication to reach an agreement. *Ibid.* And the employer has every incentive to do so, because the employer remains "free to settle after the EEOC files suit." *Id.* at 18a. Unsurprisingly, in the circuits that permit judicial review, the effort to "stockpile exhibits" is already happening.[13]

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[13] See, *e.g.*, Seyfarth Shaw LLP, *Pro-Actively Addressing and Preparing for EEOC Investigations & Lawsuits* 7 (2012) ("[E]very communication [with the EEOC] should be viewed as an exhibit to a future motion to a federal district court judge."), http://www.seyfarth.com/dir_docs/publications/EEOCCountdownWebinar72512.pdf; see also Strafford Publications, Inc., *Defending Title VII Litigation: Rethinking Strategies After Recent Employee-Friendly Federal Court Rulings* 19 (June 18, 2014) (advising employers on how to "[s]et up [a] failure to conciliate defense" during conciliation), http://media.straffordpub.com/products/defending-title-vii-litigation-rethinking-strategies-after-recent-employee-friendly-federal-court-rulings-2014-06-18/presentation.pdf.

Second, both the employer's and the EEOC's willingness to engage in frank conversations and negotiations decreases when they know those communications may be used in court. The "prospect of disclosure or possible admission into evidence" of conciliation proposals "tend[s] to inhibit the kind of free and open communication necessary to achieve" voluntary compliance. *Branch* v. *Phillips Petroleum Co.*, 638 F.2d 873, 881 (5th Cir. 1981). The EEOC's "investigation and conciliation" must be "carried on in privacy" for conciliation to succeed. *Associated Dry Goods Corp.*, 449 U.S. at 599 n.16 (quoting statement of Sen. Dirksen). Even if the inadequate-conciliation issue were litigated under seal, material from conciliation could prejudice a party's rights, contrary to Congress's intention to encourage candid discussion. Further, the prospect of later judicial review makes it very unlikely that conciliation will be "cheap, informal, and relatively quick" (Pet. Br. 16), as Congress intended.

Third, employers will have every incentive to raise an inadequate-conciliation argument once litigation commences. The cost to the employer is minimal—worst case, the argument is rejected and the employer must defend the suit on the merits—and the potential upside is significant. Some courts have dismissed Title VII lawsuits on the merits as the remedy for the agency's allegedly inadequate conciliation efforts. See, *e.g.*, *EEOC* v. *CRST Van Expedited, Inc.*, 679 F.3d 657, 677 (8th Cir. 2012); *EEOC* v. *Asplundh Tree Expert Co.*, 340 F.3d 1256, 1259 (11th Cir. 2003). Even without a dismissal remedy, the employer may seek to use the dispute over the adequacy of conciliation to obtain discovery about the Commission's investigation

or the strength of the Commission's evidence, or to forestall consideration of the merits of the case. And "the stronger the EEOC's case on the merits, the stronger the incentive to use a failure-to-conciliate defense." Pet. App. 18a.

The proliferation of inadequate-conciliation arguments places substantial burdens on the EEOC and the courts. The EEOC must divert resources from investigating and litigating employment discrimination cases to create records of its conciliation efforts. Cf. *EEOC* v. *Sterling Jewelers, Inc.*, 3 F. Supp. 3d 57, 64-65 (W.D.N.Y. 2014) (permitting deposition of EEOC investigator to judge sufficiency of EEOC's investigation); see also *Southern Utah Wilderness Alliance*, 542 U.S. at 66 (noting need to "protect agencies from undue judicial interference with their lawful discretion"). As time passes, evidence may be lost and witnesses' memories may fade, making it more difficult to litigate charges of unlawful employment discrimination. See, *e.g.*, *Hardin* v. *Straub*, 490 U.S. 536, 543 n.12 (1989). And the longer the delay, the longer victims of the unlawful discrimination must wait to obtain relief. Judicial review of conciliation efforts also burdens the courts by requiring them to conduct mini-trials on this collateral issue before ever reaching the merits of a discrimination case. See Pet. App. 2a. As the court of appeals explained, this effort may be "ultimately pointless" because the decision whether conciliation has reached an acceptable conclusion is entrusted to the Commission. *Ibid.*

The "dominant purpose" of Title VII is "to root out discrimination." *Shell Oil*, 466 U.S. at 77. But an inadequate-conciliation argument allows employers to "avoid liability for unlawful discrimination" because

the agency should have conciliated differently. Pet. App. 2a. That turns the purpose of conciliation on its head by placing the burden on the EEOC to prove it tried hard enough to eliminate the alleged discrimination, even though the *employer* is the one discriminating. See *Miller*, 408 F.2d at 290-291 ("There is no provision in Title VII permitting discrimination until cajolery is duly and fully performed. The real burden of the statute is not upon the EEOC but upon the discriminator.").

2. Experience has demonstrated that the inadequate-conciliation argument is "a potent weapon in the hands of employers who have no interest in complying voluntarily with the Act, who wish instead to delay as long as possible." *Shell Oil*, 466 U.S. at 66-67, 81 (discussing notice-of-charge requirement). This case illustrates the point. Petitioner spent two years seeking extensive discovery about the Commission's investigation and conciliation efforts. Pet. App. 4a. Petitioner submitted "extensive discovery requests"—including more than 600 requests for admissions of fact—that "s[ought] information about the EEOC's investigation and conciliation efforts." *Id.* at 3a-4a, 54a n.1; see J.A. 44, 47-59; see also Summ. J. Mot. Ex. D, at 5-7 (petitioner's notice of deposition included nine topics related to the EEOC's investigation and conciliation efforts). Petitioner also "slowed discovery on the merits" by objecting to the Commission's merits-related discovery requests on "failure to conciliate" grounds. Pet. App. 4a; see Summ. J. Mot. Exs. E 3-12 (petitioner objected to nine interrogatories on inadequate-conciliation grounds), F 1-17, 18-20, 22 (petitioner objected to 24 document-production requests on inadequate-conciliation grounds).

Petitioner's inadequate-conciliation argument has shifted the focus of this lawsuit from whether petitioner engaged in systemic hiring discrimination against women to whether the EEOC had done enough during its pre-suit conciliation process. After three years of litigation, this case is no closer to a determination of the merits of the employment-discrimination claim. Cf. *Shell Oil*, 466 U.S. at 81 n.38 (dispute over sufficiency of charge stymied the EEOC's investigation "for over three years").

Numerous other cases have demonstrated that employers will use judicial review of conciliation efforts as a tactic for diversion and delay. Title VII defendants have routinely argued that the EEOC's conciliation efforts were insufficient.[14] Even though most of

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[14] Cases from just the past five years prove the point. See, *e.g.*, *EEOC* v. *New Prime, Inc.*, No. 11-CV-03367, 2014 WL 4060305, at *6-*7 (W.D. Mo. Aug. 14, 2014); *EEOC* v. *Unit Drilling Co.*, No. 13-CV-147, 2014 WL 2211011, at *2 (N.D. Okla. May 28, 2014); *EEOC* v. *Braun Elec. Co.*, No. 12-CV-01592, 2014 WL 1330566, at *4-*5 (E.D. Cal. Apr. 2, 2014); *EEOC* v. *Global Horizons, Inc.*, No. 11-CV-00257, 2014 WL 819129, at *3 (D. Haw. Feb. 28, 2014); *EEOC* v. *Spoa, LLC*, No. 13-CV-1615, 2014 WL 47337, at *4 (D. Md. Jan. 3, 2014); *EEOC* v. *Bloomberg L.P.*, 967 F. Supp. 2d 802, 813-814 (S.D.N.Y. 2013); *EEOC* v. *Abercrombie & Fitch Stores, Inc.*, 966 F. Supp. 2d 949, 958-960 (N.D. Cal. 2013); *EEOC* v. *JBS USA, LLC*, 940 F. Supp. 2d 949, 965-966 (D. Neb. 2013); *EEOC* v. *Wedco, Inc.*, No. 3:12-CV-00523, 2013 WL 1104754, at *2-*3 (D. Nev. Mar. 12, 2013); *EEOC* v. *United States Steel Corp.*, No. 10-12, 2013 WL 625315, at *10-*11 (W.D. Pa. Feb. 20, 2013); *EEOC* v. *Ruby Tuesday, Inc.*, 919 F. Supp. 2d 587, 594-595 (W.D. Pa. 2013); *EEOC* v. *Swissport Fueling, Inc.*, 916 F. Supp. 2d 1005, 1036-1037 (D. Ariz. 2013); *EEOC* v. *Finish Line, Inc.*, 915 F. Supp. 2d 904, 924 (M.D. Tenn. 2013); *EEOC* v. *Rock-Tenn Servs. Co.*, 901 F. Supp. 2d 810, 819-821 (N.D. Tex. 2012); *EEOC* v. *IPS Indus., Inc.*, 899 F. Supp. 2d 507, 524 (N.D. Miss. 2012); *EEOC* v. *La Rana*

those challenges ultimately have been rejected, employers continue to raise them because of the opportunity for discovery, delay, and possible dismissal. And since the Eighth Circuit upheld the dismissal of a Title VII lawsuit on inadequate-conciliation grounds

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Haw., LLC, 888 F. Supp. 2d 1019, 1045-1046 (D. Haw. 2012); *EEOC* v. *PBM Graphics Inc.*, 877 F. Supp. 2d 334, 363 (M.D.N.C. 2012); *EEOC* v. *Evans Fruit Co.*, 872 F. Supp. 2d 1107, 1114-1115 (E.D. Wash. 2012); *EEOC* v. *United Rd. Towing, Inc.*, No. 10-CV-6259, 2012 WL 1830099, at *5 (N.D. Ill. May 11, 2012); *EEOC* v. *Pioneer Hotel, Inc.*, No. 11-CV-1588, 2012 WL 1601658, at *3 (D. Nev. May 4, 2012); *EEOC* v. *River View Coal, LLC*, No. 4:11-CV-00117, 2012 WL 1593138, at *2-*3 (W.D. Ky. May 4, 2012); *EEOC* v. *Luihn Food Sys., Inc.*, No. 09-CV-387, 2011 WL 4747896, at *5 (E.D.N.C. Sept. 20, 2011); *EEOC* v. *AMX Commc'ns, Ltd.*, No. 09-CV-2483, 2011 WL 3555831, at *5 (D. Md. Aug. 8, 2011); *EEOC* v. *Crye-Leike, Inc.*, 800 F. Supp. 2d 1009, 1017-1018 (E.D. Ark. 2011); *EEOC* v. *McGee Bros.*, No. 10-CV-142, 2011 WL 1542148, at *4 (W.D.N.C. Apr. 21, 2011); *EEOC* v. *Riverview Animal Clinic, P.C.*, 761 F. Supp. 2d 1296, 1302 (N.D. Ala. 2010); *EEOC* v. *O'Reilly Auto. Inc.*, No. 08-CV-2429, 2010 WL 5391183, at *7 (S.D. Tex. Dec. 14, 2010), report & recomm. adopted, 2010 WL 5387634, at *1 (S.D. Tex. Dec. 16, 2010); *EEOC* v. *High Speed Enter., Inc.*, No. CV-08-01789, 2010 WL 8367452, at *5 (D. Ariz. Sept. 30, 2010); *EEOC* v. *California Psychiatric Transitions, Inc.*, 725 F. Supp. 2d 1100, 1117 (E.D. Cal. 2010); *EEOC* v. *Bimbo Bakeries USA, Inc.*, No. 09-CV-1872, 2010 WL 598641, at *6-*7 (M.D. Pa. Feb. 17, 2010); *EEOC* v. *Wal-Mart Stores, Inc.*, No. 07-0300, 2009 WL 3028981, at *3 (D.N.M. Sept. 8, 2009); *EEOC* v. *Champion Chevrolet*, No. 3:07-CV-444, 2009 WL 2835101, at *7-*8 (D. Nev. Aug. 26, 2009); *EEOC* v. *Preston Hood Chevrolet, LLC*, No. 08-CV-1265, 2009 WL 2489184, at *2 (S.D. Miss. Aug. 13, 2009); *EEOC* v. *Healthcare & Ret. Corp. of Am.*, No. 07-CV-13670, 2009 WL 2488110, at *1 (E.D. Mich. Aug. 11, 2009); *EEOC* v. *Columbia Sussex Corp.*, 632 F. Supp. 2d 576, 585-586 (M.D. La. 2009); *EEOC* v. *Paramount Staffing, Inc.*, 601 F. Supp. 2d 986, 990-991 (W.D. Tenn. 2009); *EEOC* v. *Gonnella Baking Co.*, No. 08C5240, 2009 WL 307509, at *4 (N.D. Ill. Feb. 5, 2009).

in *EEOC* v. *CRST Van Expedited, Inc.*, *supra*, the frequency with which employers raise the argument has increased. The court of appeals therefore was correct to be concerned that employers would use judicial review of conciliation to thwart the purposes of Title VII.

3. Petitioner mistakenly contends (Br. 46-49) that judicial review of the conciliation process is necessary to ensure that the EEOC conciliates in good faith. The Commission's activities are entitled to a presumption of regularity. See, *e.g.*, *National Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 174 (2004). The Commission takes its obligation to conciliate seriously, and it has adopted standard practices to ensure that it invites an employer to conciliate in every case where it makes a reasonable-cause finding and to ensure that employers have written notice when the EEOC has determined that conciliation has not yielded an acceptable agreement. See pp. 20-21, *supra*. The result is that the Commission is complying with its statutory directive to attempt conciliation in every case before filing suit.[15] Courts may check

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[15] Petitioner is wrong to assert (Br. 32) that there are numerous cases in which "the Commission refused to engage in any relevant conciliation at all." The Commission is aware of only one substantive enforcement action under 42 U.S.C. 2000e-5 where the EEOC did not offer to conciliate, and that case involved a question of whether the conciliation obligation applied on the unique facts of the case. See *EEOC* v. *Pierce Packing Co.*, 669 F.2d 605, 607-608 (9th Cir. 1982) (uncertainty about whether EEOC had to make its own reasonable-cause finding or conciliate when an employee filed sex-discrimination charges with both the Department of Labor (DOL) and the EEOC and the DOL investigated and found cause to support the charge). In one other case, a court issued a stay after stating that it was unclear whether the Commission had

that compliance by reviewing the documents the EEOC sends employers to start and end conciliation. See *Shell Oil*, 466 U.S. at 65, 81 (review of charges for facial sufficiency provides a sufficient constraint on the EEOC's investigative authority). The EEOC's efforts also are subject to "meaningful scrutiny" from the political Branches, because Congress may conduct oversight hearings and amend Title VII, and the President appoints the commissioners with the advice and consent of the Senate. Pet. App. 20a-21a.

The EEOC has "powerful incentives to conciliate." Pet. App. 20a. Voluntary compliance requires fewer agency resources than litigation and ensures that unlawful employment practices are remedied more quickly. *Ibid.* The EEOC relies on conciliation as a primary method of obtaining monetary relief for victims of discrimination.[16] In 2013, for example, the Commission received over 90,000 charges of discrimination (under all anti-discrimination statutes it enforces), found reasonable cause in 3515 cases, and successfully conciliated in 1437 cases. The Commission filed suit on the merits in only 131 of the remain-

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attempted conciliation. See *EEOC* v. *Chesapeake & Ohio Ry. Co.*, No. 39-73-NN, 1973 WL 307, at *1 (E.D. Va. Oct. 10, 1973). All of the other cases petitioner cites raise arguments not that the Commission failed to conciliate at all, but that its efforts at conciliation fell short.

[16] See EEOC, *EEOC Litigation Statistics FY 1997 through FY 2013*, http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm (last visited Oct. 26, 2014) (*EEOC Litigation Statistics*); EEOC, *All Statutes, FY 1997-2013*, http://www.eeoc.gov/eeoc/statistics/enforcement/all.cfm (last visited Oct. 26, 2014) (*All Statutes*) (together reporting that in 2013, the Commission obtained $372.1 million through non-litigation resolutions, but recovered just $38.6 million through litigation).

ing 2078 cases.[17] These data confirm the importance of conciliation to the EEOC. They also underscore that the EEOC, like any federal agency, has budget and personnel constraints that ensure that conciliation remains a principal focus of the Commission's efforts. See *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 291, 297 (2002) (recognizing that the Title VII "confers on the agency the authority to evaluate the strength of the public interest" and make judgments about "which of the remedies authorized by law that it shall seek in any given case").

Out of over 10,000 cases the Commission has filed since 1980, petitioner and its amici point to a small number of cases as examples of the Commission's purportedly inadequate conciliation. But as petitioner's amici recognize, these cases do not reflect the Commission's general practice. Retail Litig. Ctr. Amicus Br. 18 ("[I]n the vast majority of cases, the EEOC's conciliation efforts satisfy *any* Circuit's test."). In any event, a few courts' judgment that the EEOC did not try hard enough to conciliate does not resolve whether courts should be asking that question in the first place.

E. Petitioner's Proposed Judicial Review Is Unworkable And Unwise

1. Petitioner contends (Br. 35-36) that the experience in the circuits has proven that judicial oversight of the conciliation process is workable. Petitioner is wrong. Lacking any express guidance from Title VII's text, the courts that have sought to evaluate the Commission's conciliation efforts "have struggled to provide meaningful guidance on how to judge the

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[17] See *EEOC Litigation Statistics; All Statutes.*

process." Pet. App. 27a. The courts of appeals have articulated different standards for reviewing the Commission's conciliation efforts. Some courts ask the open-ended (and inevitably intrusive) question whether the Commission "ma[de] a good faith effort to conciliate the claim." *EEOC* v. *Keco Indus., Inc.*, 748 F.2d 1097, 1102 (6th Cir. 1984); see *EEOC* v. *Radiator Specialty Co.*, 610 F.2d 178, 183 (4th Cir. 1979); *EEOC* v. *Zia Co.*, 582 F.2d 527, 533-534 (10th Cir. 1978).[18]

Other courts have used a more focused three-part test for evaluating the Commission's conciliation efforts, asking whether the Commission (1) has sufficiently explained its reasonable cause determination to the employer, (2) has provided the employer with a sufficient opportunity to comply voluntarily, and (3) has responded "in a reasonable and flexible manner to the reasonable attitudes of the employer." *Asplundh Tree Expert Co.*, 340 F.3d at 1259; *EEOC* v. *Klingler Elec. Corp.*, 636 F.2d 104, 107 (5th Cir. 1981) (per curiam). Courts performing that inquiry often review the details of conciliation to make their own judgment as to whether the agency was sufficiently "reasonable" and "flexible" in negotiations.[19]

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[18] See, *e.g.*, *Keco*, 748 F.2d at 1101-1102 (reviewing the terms of a proposed conciliation agreement and deciding whether conciliation efforts had sufficiently "broke[n] down"); *Radiator Specialty Co.*, 610 F.2d at 183 (examining all communications between the parties before concluding that the failure to reach agreement "cannot be attributed to the Commission"); *Zia Co.*, 582 F.2d at 531-534 (reviewing the parties' interactions in detail and concluding that the Commission should have "given" the defendant "more time").

[19] See, *e.g.*, *EEOC* v. *Sears, Roebuck & Co.*, 650 F.2d 14, 17-19 (2d Cir. 1981) (although the Commission attempted conciliation for 14 months, with 28 meetings between the parties and "extensive correspondence," court affirmed dismissal of the lawsuit because

The indeterminacy of these standards is reflected in the fact that courts purporting to apply the same test often have disagreed on which factors are relevant.[20] And the "distinction between process and substance" has proven to be illusory, because courts inevitably have reviewed the content of communications and offers during conciliation to judge the sufficiency of the Commission's efforts. Pet. App. 12a.[21]

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the Commission sought a conciliation agreement that was nationwide in scope, but sued regarding discrimination at only two stores); *Klingler Elec. Corp.*, 636 F.2d at 107 (calling for a "thorough inquiry" into the terms of the proposed conciliation agreement; the "materiality of the information" the employer proposed to add to the agreement; "the history of negotiations"; and "the nature of the EEOC's counter-proposal and [the employer's] response" in order to judge "the reasonableness and responsiveness of the EEOC's conduct under all the circumstances").

[20] Some courts claiming to simply check for "good faith conciliation" have required EEOC to identify all claimants during conciliation, see *Swissport Fueling, Inc.*, 916 F. Supp. 2d at 1036-1040, while others have not, see *EEOC* v. *Scolari Warehouse Mkts., Inc.*, 488 F. Supp. 2d 1117, 1129 & n.14 (D. Nev. 2007). Some courts applying the "good faith" standard have required the EEOC to provide the basis for a monetary demand, see *EEOC* v. *Pacific Mar. Ass'n*, 188 F.R.D. 379, 380-381 (D. Or. 1999), while others have not, see *Serrano* v. *Cintas Corp.*, 699 F.3d 884, 904-905 (6th Cir. 2012), cert. denied, 134 S. Ct. 92 (2013). Some courts purporting to apply a deferential standard have scrutinized the reasonableness of the EEOC's conciliation demand, see *EEOC* v. *First Midwest Bank N.A.*, 14 F. Supp. 2d 1028, 1032 (N.D. Ill. 1998), while others claiming to apply a heightened standard have not, see *PBM Graphics*, 877 F. Supp. 2d at 363.

[21] Several courts reviewing the Commission's conciliation efforts have criticized the Commission's substantive decisions during conciliation. See *EEOC* v. *Agro Distrib., LLC*, 555 F.3d 462, 468 (5th Cir. 2009) (criticizing EEOC for size of compensatory damages demand); *Ruby Tuesday*, 919 F. Supp. 2d at 595 (same); *EEOC*

The result is that evaluating the Commission's conciliation process has been left largely to the ad hoc judgments of individual judges, leaving the Commission entirely uncertain about whether a court will later decide that its conciliation efforts are in some way inadequate.

Courts also have struggled to perform this judicial review while respecting Title VII's confidentiality provisions. See Pet. App. 8a-9a & n.1. The EEOC has been placed between a proverbial "rock and a hard place" because some courts have recognized an insufficient-conciliation defense to which the EEOC must respond but also have forbidden the EEOC from divulging information about conciliation proceedings. See *EEOC* v. *United States Steel Corp.*, No. 10-1284, 2012 WL 1150799 (W.D. Pa. Apr. 5, 2012) (after employer sought dismissal based on EEOC's purported failure to satisfy its pre-suit requirements, EEOC provided documents showing it conciliated; employer then argued that the EEOC improperly disclosed confidential documents, asked that they be struck, and later moved for attorney's fees and costs against the EEOC); see also note 9, *supra* (describing confidentiality disputes in this case).

2. From the beginning of this litigation, petitioner has sought wide-ranging judicial review of the Commission's conciliation process. Petitioner describes

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v. *Pet, Inc., Funsten Nut Div.*, 612 F.2d 1001, 1002 (5th Cir. 1980) (per curiam) (criticizing EEOC for refusing to dispose of some but not all claims); *EEOC* v. *Sears, Roebuck & Co.*, No. 79CV5708, 1980 WL 180, at *1 (S.D.N.Y. June 16, 1980) (same), aff'd, 650 F.2d 14 (2d Cir. 1981); *EEOC* v. *HomeNurse, Inc.*, No. 1:13–CV–02927, 2013 WL 5779046, at *14 (N.D. Ga. Sept. 30, 2013) (criticizing EEOC for failure to reach agreement to resolve the charge during investigation).

this review as evaluating whether the Commission acted in "good faith" and whether its efforts were "genuine" and "meaningful." Pet. Br. 8, 38, 41, 45; Pet. C.A. Br. 21, 42. Petitioner also has described the inquiry as an ad hoc review of "whether the EEOC has, under the circumstances of the particular case, acted reasonably, sincerely, and responsively." Pet. C.A. Br. 8; see *id.* at 12, 42, 43 & n.14; Def.'s Summ. J. Br. 7.

Petitioner contends that the EEOC must provide an employer with particular information in every conciliation, including "an outline of the factual and legal basis for the claims," a detailed explanation for its remedial requests, and details about its investigation. See Pet. Br. 39-40; see also *id.* at 10, 25-26, 37-38. Petitioner also contends (Br. 40) that the Commission is required to propose some number of offers and consider some number of counteroffers, and that the EEOC cannot make a "take-it-or-leave-it offer." In petitioner's view (Br. 38), the EEOC also must tell the employer on what terms it would agree to resolve the charge. And petitioner proposes (Br. 40) that conciliation must last some set amount of time for it to be fair to the employer. Petitioner's proposed penalty for failing to meet these requirements is severe—dismissal of the Title VII case on the merits. See Pet. Br. 18 n.10, 31; Pet. C.A. Br. 46 n.16; J.A. 30.[22]

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[22] Before the district court and court of appeals, petitioner advocated an even heavier burden, arguing that the EEOC must "function" in the role "of a neutral," Def.'s Summ. J. Br. 6; see *id.* at 20; that the Commission must hold in-person meetings at the employer's request, see Def.'s Summ. J. Br. 19, 20; see Pet. C.A. Br. 6, 45; that the Commission must continue conciliation as long as the employer expresses a "willingness to conciliate," Def.'s Summ. J.

This proposed set of rules places a heavy burden on the EEOC, one unknown in civil settlement negotiations. Courts do not generally require civil litigants to provide all the information they have compiled about the case to the other party, or immediately tell the other party on what terms they will settle. Nor do courts forbid parties from making "take-it-or-leave-it" offers. And still less do courts impose these constraints in service of a standard that is entirely indeterminate, leaving each individual judge to decide "just how many offers, counteroffers, conferences, or phone calls should be necessary to satisfy judicial review" in a given case. Pet. App. 9a. Yet petitioner would place all of these burdens on the Commission—inviting manipulation by defendants, intrusion into the agency's decisionmaking process, and uncertainty for all concerned—and petitioner would do so even though the statute envisions an "informal" process.[23]

Br. 20; see Pet. C.A. Br. 6 (same); and that the Commission may file suit "only if [conciliation] is *impossible*." Def.'s Summ. J. Br. 5, 13. The fact that petitioner's proposed standard has changed throughout the course of the litigation shows how malleable it is. Indeed, that is why the court of appeals remarked that petitioner had provided no "workable standard" to the court, "despite repeated invitations." Pet. App. 9a-10a.

[23] The Commission agrees that it may not attempt conciliation with one employer and then sue a union or an unrelated employer, or attempt conciliation on a charge of sex discrimination and then sue for race discrimination. Although there are cases from the 1970s where that occurred, see *EEOC* v. *Allegheny Airlines*, 436 F. Supp. 1300 (W.D. Pa. 1977); *Patterson* v. *American Tobacco Co.*, 535 F.2d 257 (4th Cir.), cert. denied, 429 U.S. 920 (1976), it is not the EEOC's practice now. A court can readily check that the Commission has attempted defendant- and claim-specific conciliation, because the reasonable-cause letter identifies the respondent and the particular type of claim at issue. See, *e.g.*, J.A. 14-15.

3. Even if this Court were to conclude that judicial review of conciliation is appropriate, it should hold that dismissal of a Title VII suit on the merits is too "final and drastic" a remedy for a deficiency in conciliation. Pet. App. 30a. Petitioner's contention (Br. 40-41) is that Title VII guarantees an employer a certain procedure. But the remedy for any lack of appropriate process is to provide appropriate process. See Pet. App. 17a ("All the employer should legitimately hope to gain is some unspecified quantum of additional efforts."); see also, *e.g.*, *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 744 (1985) (agency remand rule). A failure of the conciliation process does not disprove or cutoff the claim of employment discrimination, and thus merits dismissal is an inappropriate remedy. Pet. App. 29a (court should not "let[] one party off the hook entirely" because of a process deficiency). A merits dismissal would inappropriately "excuse the employer's (assumed) unlawful discrimination" and impose the "significant social costs of allowing employment discrimination to go unaddressed." *Id.* at 28a, 30a.

This does not mean the Commission must identify every possible claimant at the conciliation stage, because the EEOC may bring a representative action in cases of class-wide discrimination. See *General Tel. Co. of the Nw., Inc.* v. *EEOC*, 446 U.S. 318, 323-324 (1980). Often, in such cases, the information necessary to identify each member of the class is within the employer's control and is provided during conciliation or litigation. The statutory text provides no basis for requiring all possible victims to be identified during conciliation; the Commission's charge is to determine whether there is reasonable cause to believe that an unlawful employment practice has occurred, 42 U.S.C. 2000e-5(b), not to establish all facts it will later need to prove in court.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 42 U.S.C. 2000e-5 provides:

Enforcement provisions

(a) Power of Commission to prevent unlawful employment practices

The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.

(b) Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc.; filing; allegations; notice to respondent; contents of notice; investigation by Commission; contents of charges; prohibition on disclosure of charges; determination of reasonable cause; conference, conciliation, and persuasion for elimination of unlawful practices; prohibition on disclosure of informal endeavors to end unlawful practices; use of evidence in subsequent proceedings; penalties for disclosure of information; time for determination of reasonable cause

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such em-

ployer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable

under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

(c) State or local enforcement proceedings; notification of State or local authority; time for filing charges with Commission; commencement of proceedings

In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a)[1] of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

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[1] So in original. Probably should be subsection "(b)".

(d) State or local enforcement proceedings; notification of State or local authority; time for action on charges by Commission

In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e) Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency; seniority system

(1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authori-

ty to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(2) For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this subchapter (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

(3)(A) For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this subchapter, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.

(B) In addition to any relief authorized by section 1981a of this title, liability may accrue and an aggrieved person may obtain relief as provided in subsection (g)(1), including recovery of back pay for up to two years preceding the filing of the charge, where the unlawful employment practices that have occurred during the charge filing period are similar or related to unlawful employment practices with regard to discrimination in compensation that occurred outside the time for filing a charge.

(f) **Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master**

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the

Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section, is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involv-

ing a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district

in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) **Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders**

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

(2)(A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

(B) On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a

respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

(h) Provisions of chapter 6 of title 29 not applicable to civil actions for prevention of unlawful practices

The provisions of chapter 6 of title 29 shall not apply with respect to civil actions brought under this section.

(i) Proceedings by Commission to compel compliance with judicial orders

In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this section, the Commission may commence proceedings to compel compliance with such order.

(j) Appeals

Any civil action brought under this section and any proceedings brought under subsection (i) of this section shall be subject to appeal as provided in sections 1291 and 1292, title 28.

(k) Attorney's fee; liability of Commission and United States for costs

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

2. 29 C.F.R. 1601.24 provides:

Conciliation: Procedure and authority.

(a) Where the Commission determines that there is reasonable cause to believe that an unlawful employment practice has occurred or is occurring, the Commission shall endeavor to eliminate such practice by informal methods of conference, conciliation and persuasion. In conciliating a case in which a determination of reasonable cause has been made, the Commission shall attempt to achieve a just resolution of all violations found and to obtain agreement that the respondent will eliminate the unlawful employment practice and provide appropriate affirmative relief. Where such conciliation attempts are successful, the terms of the conciliation agreement shall be reduced to writing and shall be signed by the Commission's designated representative and the parties. A copy of the signed agreement shall be sent to the respondent and the person claiming to be aggrieved. Where a charge has been filed on behalf of a person claiming to be aggrieved, the conciliation agreement may be

signed by the person filing the charge or by the person on whose behalf the charge was filed.

(b) District Directors; the Director of the Office of Field Programs or the Director of Field Management Programs; or their designees are hereby delegated authority to enter into informal conciliation efforts. District Directors or upon delegation, Field Directors, Area Directors, or Local Directors; the Director of the Office of Field Programs; or the Director of Field Management Programs are hereby delegated the authority to negotiate and sign conciliation agreements. When a suit brought by the Commission is in litigation, the General Counsel is hereby delegated the authority to negotiate and sign conciliation agreements where, pursuant to section 706(f)(1) of title VII, a court has stayed processings in the case pending further efforts of the Commission to obtain voluntary compliance.

(c) Proof of compliance with title VII, the ADA, or GINA in accordance with the terms of the agreement shall be obtained by the Commission before the case is closed. In those instances in which a person claiming to be aggrieved or a member of the class claimed to be aggrieved by the practices alleged in the charge is not a party to such an agreement, the agreement shall not extinguish or in any way prejudice the rights of such person to proceed in court under section 706(f)(1) of title VII, the ADA, or GINA.

3. 29 C.F.R. 1601.25 provides:

Failure of conciliation; notice.

Where the Commission is unable to obtain voluntary compliance as provided by title VII, the ADA, or GINA and it determines that further efforts to do so would be futile or nonproductive, it shall, through the appropriate District Director, the Director of the Office of Field Programs, or Director of Field Management Programs, or their designees, so notify the respondent in writing.

4. 29 C.F.R. 1601.26 provides:

Confidentiality of endeavors.

(a) Nothing that is said or done during and as part of the informal endeavors of the Commission to eliminate unlawful employment practices by informal methods of conference, conciliation, and persuasion may be made a matter of public information by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. This provision does not apply to such disclosures to the representatives of Federal, State or local agencies as may be appropriate or necessary to the carrying out of the Commission's functions under title VII, the ADA, or GINA: *Provided, however*, That the Commission may refuse to make disclosures to any such agency which does not maintain the confidentiality of such endeavors in accord with this section or in any circumstances where the disclosures will not serve the purposes of the effective enforcement of title VII, the ADA, or GINA.

(b) Factual information obtained by the Commission during such informal endeavors, if such information is otherwise obtainable by the Commission under section 709 of title VII, for disclosure purposes will be considered by the Commission as obtained during the investigatory process.

REPLY BRIEF

RECORD
AND
BRIEFS

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IN THE

Supreme Court of the United States

MACH MINING, LLC,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

REPLY BRIEF FOR THE PETITIONER 1

I. The Government's Proposed Standard Amounts To No Judicial Review At All. 1

II. The Text And History Of Title VII Do Not Demonstrate Congress's Intent To Preclude Judicial Enforcement Of The Conciliation Precondition 3

A. The Statutory Language Does Not Give The Commission Unreviewable Discretion Over The Process For Conducting Mandatory Conciliation 4

B. The Confidentiality Provisions Do Not Demonstrate That Congress Intended To Preclude Judicial Enforcement Of The Conciliation Precondition. 10

C. The Statutory History Does Not Support The Government's Interpretation. 15

III. The Government's APA Argument Is Irrelevant And Meritless 15

IV. Judicial Enforcement Of The Conciliation Precondition Does Not Harm Title VII Enforcement. 17

V. In The Absence Of EEOC Regulations, This Court Should Identify Several Principles That Elaborate The Conciliation Precondition. 22

CONCLUSION 25

TABLE OF AUTHORITIES

Cases

AT&T v. EEOC,
270 F.3d 973 (D.C. Cir. 2001) 16, 17

Choate v. Caterpillar Tractor Co.,
402 F.2d 357 (7th Cir. 1968) 12

Citizens to Preserve Overton Park, Inc. v. Volpe,
401 U.S. 402 (1971) 4

Costello v. United States,
365 U.S. 265 (1999) 20

Criales v. American Airlines, Inc.,
105 F.3d 93 (2d Cir. 1997) 20

Dent v. St. Louis-San Francisco Ry. Co.,
406 F.2d 399 (1969) 2, 11, 12

Duncan v. Walker,
533 U.S. 167 (2001) 10

EEOC v. Associated Dry Goods,
449 U.S. 590 (1981) 14, 18

EEOC v. CVS Pharmacy,
No. 14-cv-863, 2014 WL 5034657 (N.D. Ill.
Oct. 7, 2014.) 2

EEOC v. Klingler,
636 F.2d 104 (5th Cir. 1981) 20

EEOC v. Massey-Ferguson, Inc.,
622 F.2d 271 (7th Cir. 1980) 20

EEOC v. Sears, Roebuck & Co.,
650 F.2d 14 (1981) 20, 20

EEOC v. Shell Oil,
466 U.S. 54 (1984) 3, 6, 7, 22

Ford Motor Co. v. EEOC,
458 U.S. 219 (1982) 5, 12, 17

FTC v. Standard Oil Co. of Calif.,
449 U.S. 232 (1980) 16

Hallstrom v. Tillamook Co.,
493 U.S. 20 (1989) 20

Johnson v. Seaboard Air Line R. Co.,
405 F.2d 645 (4th Cir. 1968) 11, 12

Lincoln v. Vigil,
508 U.S. 182 (1993) 4

Littleton Fin. Printing Div. v. NLRB,
501 U.S. 190 (1991) 5

Miller v. Int'l Paper Co.,
408 F.2d 283 (5th Cir. 1969) 11, 12

Nat'l Cable & Telecom. Ass'n v. Brand X Internet Svcs.,
545 U.S. 967 (2005) 23

NLRB v. Acme Indust. Co.,
385 U.S. 432 (1967) 23

NLRB v. General Electric Co.,
418 F.2d 736 (2d Cir. 1969) 23

Occidental Life Insurance Company of California v. EEOC,
432 U.S. 355 (1977) 9, 20

Rhines v. Weber,
544 U.S. 269 (2005) 20

United States v. Zucca,
351 U.S. 91 (1956) 16

Woodford v. Ngo,
548 U.S. 81 (2006) 2

Zipes v. TWA, Inc.,
455 U.S. 385 (1982) 9

Statutes

Administrative Procedure Act,
5 U.S.C. §§ 551 *et seq.* 4, 15, 16, 17

23 U.S.C. § 138 4

42 U.S.C. § 2000e-5 14

42 U.S.C. § 2000e-5(b) 7, 10, 14, 23

42 U.S.C. § 2000e-6(a) 2

42 U.S.C. § 2000e-8(e) 14

Rules

Fed. R. Civ. P. 11 20

Fed. R. Evid. 408(a) 14

Regulations

29 C.F.R. Part 601 5

Other Authorities

Peter N. Thompson, *Good Faith Mediation in the Federal Courts*,
26 OHIO ST. J. ON DISP. RESOL. 363 (2011) 5

REPLY BRIEF FOR THE PETITIONER

Petitioner's opening brief demonstrated that as a mandatory condition precedent to the Commission's litigation authority, Title VII's conciliation requirement is presumptively subject to judicial enforcement. *See* Petr. Br. 17-22. The United States seemingly agrees, making no effort to contest petitioner's showing that this Court's precedents make such preconditions presumptively enforceable. Indeed, the Government seems to acknowledge that courts may enforce the conciliation obligation at least to *some* degree. *See* U.S. Br. 53 n.22 (agreeing that a court may "check that the Commission has attempted defendant- and claim-specific conciliation"). But the standard of review the Solicitor General proposes is so empty that it effectively amounts to no judicial review at all. Accordingly, the decision below can be affirmed only if the Court concludes that something special about the conciliation precondition overcomes the ordinary presumption that litigation preconditions are subject to meaningful judicial review. The Government's attempts to make that showing fall short.

I. The Government's Proposed Standard Amounts To No Judicial Review At All.

The Government now seemingly agrees that compliance with the conciliation precondition *is* subject to judicial review – at least to some extent. The Solicitor General acknowledges that the statute requires the EEOC to "attempt conciliation" before filing suit, and apparently recognizes that a court can

enforce compliance with that requirement. U.S. Br. 20; *see also id.* 53 n.22.[1] But the Government then asserts that compliance is conclusively established by submitting the EEOC's "letter inviting [the employer] to conciliate" and another letter "noting that conciliation had failed to yield an acceptable agreement." U.S. Br. 21-22.

This perfunctory and self-serving standard is tantamount to denying judicial enforcement of the conciliation precondition altogether. At best, the EEOC's letters would show that *the Commission* is satisfied that it has met it conciliation obligation. *But see, e.g.*, *Dent v. St. Louis-San Francisco Ry. Co.*, 406 F.2d 399, 401 (1969) (EEOC sent similar letters even though, in fact, "there was no conciliation" due to an agency backlog). But accepting an agency's representation that it believes it has complied with the law amounts to no *judicial* review at all.

Nothing in the statute justifies such toothless review. In construing a similar statutory precondition to litigation in *Woodford v. Ngo*, 548 U.S. 81 (2006), this Court held that a requirement that prisoners exhaust available administrative remedies was not satisfied by the prisoner's mere

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[1] The Government asserts in a footnote that the Commission need not conciliate "a case involving a pattern or practice of employment discrimination under 42 U.S.C. § 2000e-6(a)." U.S. Br. 20 n.4. But it does not explain why or urge affirmance on that novel and baseless theory. *See, e.g.*, *EEOC v. CVS Pharmacy*, No. 14-cv-863, 2014 WL 5034657, at *3-*4 (N.D. Ill. Oct. 7, 2014.) (rejecting argument). Nor did the Government make that argument below or in its response to the petition for certiorari.

filing of a grievance that was rejected. Instead, "*proper* exhaustion of administrative remedies is necessary." *Id.* at 84 (emphasis added). This Court applied the same insight to Title VII's preconditions in *EEOC v. Shell Oil*, 466 U.S. 54 (1984), when it held that the EEOC is empowered to issue investigative subpoenas only upon filing of a "*valid* charge" of discrimination. *Id.* at 65 (emphasis added). Likewise, when Congress made conciliation a precondition to the EEOC's authority to file a lawsuit, Congress plainly meant *proper* conciliation, *i.e.*, a good faith, genuine conciliation effort. Otherwise, what is the point of the provision? And while there may be some disagreement over what proper conciliation entails, *see infra* § V, there should be no dispute that the Government's proposed rule is woefully inadequate to enforce *any* reasonable conception of that requirement.

II. The Text And History Of Title VII Do Not Demonstrate Congress's Intent To Preclude Judicial Enforcement Of The Conciliation Precondition.

Perhaps recognizing as much, the Government quickly moves on to its principal, categorical argument that "Congress did not intend judicial review of the Commission's conciliation efforts." U.S. Br. 32 (capitalization altered). But nothing the Government points to in the text or history of Title VII's conciliation precondition overcomes the ordinary presumption that conditions precedent to suit are subject to judicial enforcement.

A. The Statutory Language Does Not Give The Commission Unreviewable Discretion Over The Process For Conducting Mandatory Conciliation.

1. The Government claims that Title VII's "text commits the process" of conciliation "to the agency's discretion" because it provides "no standards by which to judge the Commission's conciliation process." U.S. Br. 17; *see also id.* 36-39 (arguing that review of conciliation would be barred under the Administrative Procedure Act (APA) by the exception for matters "committed to agency discretion by law"). This argument fails for two fundamental reasons.

First, the implication that Congress intended to give an agency unreviewable discretion arises only in "those rare circumstances," *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993), in which a statute is "drawn in such broad terms that in a given case there is no law to apply," *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (citation omitted); *see also id.* at 405 (holding exception inapplicable to provision permitting agency to fund roads that cut through public parks if no "feasible and prudent" alternative route exists) (quoting 23 U.S.C. § 138).

The Government cannot seriously claim that the conciliation process was committed to agency discretion under this test, having acknowledged that courts have long enforced a comparable provision of the National Labor Relations Act (NLRA) that requires good-faith bargaining between employers and unions. *See* U.S. Br. 38; *see also Ford Motor Co.*

v. EEOC, 458 U.S. 219, 226 n.8 (1982) (noting that Congress modeled parts of Title VII on NLRA).[2] They also regularly enforce local rules requiring parties to participate in court mediation programs in good faith. *See* Peter N. Thompson, *Good Faith Mediation in the Federal Courts*, 26 OHIO ST. J. ON DISP. RESOL. 363, 383 (2011); *see also id.* at 385 nn. 94-95 (noting that dozens of state and federal laws require good faith mediation participation). Likewise, four decades of judicial experience have demonstrated that Title VII's conciliation provision is susceptible of judicial elaboration. And petitioner has proposed a number of specific rules grounded in those cases, the text and purposes of the statute, and common understanding of what meaningful conciliation requires in this context. *See* Petr. Br. 37-40.

Second, the lack of detail regarding conciliation procedures in the text of Title VII reflects nothing more than Congress's expectation that the Commission would issue implementing regulations, as it has with respect to other preconditions to suit indisputably subject to judicial review. *See* 29 C.F.R. Part 601. The courts have been required to develop conciliation standards only because the Commission

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[2] The Government notes that the NLRA imposes other more specific obligations as well, U.S. Br. 38, but does not deny that courts (and the NLRB, through regulations) have given the good-faith bargaining obligation independent meaning. *See Littleton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198, 200 (1991) (explaining that the "unilateral change doctrine," which prohibits employers from changing employment terms during labor negotiations, "represents the Board's interpretation of the NLRA requirement that parties bargain in good faith").

itself has steadfastly declined to do so, as part of its concerted effort to ensure that its compliance with the conciliation precondition is never reviewed by the judiciary. *See* U.S. Br. 38 n.12.

It makes perfect sense that Congress would prefer that the details be established by regulation. The Commission is well positioned to set basic requirements that ensure a process recognizable as conciliation and likely to achieve the statutory goal of informal settlement, while maintaining appropriate flexibility. Congress also would have expected the Commission to develop rules that do not infringe upon the agency's statutory authority to decide for itself what constitutes an acceptable conciliation agreement.

At the same time, however, Congress would have understood that courts would hold the Commission to the standards it set in any regulations reasonably interpreting the statute. *See Shell Oil*, 466 U.S. at 67 (noting that the Commission's regulations governing the content of discrimination charges are "binding on the Commission as well as claimants"). After all, it is one thing to trust an agency to develop appropriate standards for its own conduct *ex ante* through notice-and-comment rulemaking (which is itself subject to judicial review) and quite another to trust that absent judicial review each of the EEOC's thousands of employees will engage in genuine conciliation efforts in tens of thousands of cases across the country.

Thus, in *Shell Oil*, this Court enforced the requirement that an administrative subpoena be predicated on a valid charge of discrimination, even while acknowledging that the "statute itself

prescribes only minimal requirements." 466 U.S. at 67. Instead of concluding that the lack of statutory detail precluded judicial enforcement, the Court recognized that Congress had charged the Commission with responsibility for establishing more detailed requirements through regulations, which this Court then interpreted in light of considerations "drawn from the structure of Title VII" and its purposes. *Id.* at 68.[3]

Of course, the Commission has refused to issue binding regulations construing the conciliation provision. But an agency cannot avoid judicial enforcement of one statutory obligation by failing to undertake another.

2. Nor does judicial review of the conciliation process "almost inevitably" result "in a prohibited inquiry into the substantive reasonableness of particular offers." U.S. Br. 17. The Government does not dispute that courts affording judicial review to

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[3] The Government notes that in *Shell Oil*, the Court declined to "look behind the charge to determine whether it was supported by a sufficient factual basis." U.S. Br. 23. But the Court refused to look behind the charging document because the statute conditioned the Commission's subpoena power on the "existence of a charge that meets the requirements set forth" in the statute, and those requirements specify that the charge contain particular information, not that it be supported by any quantum of proof. *Shell Oil*, 466 U.S. at 65 (citing 42 U.S.C. § 2000e-5(b)). Enforcing the statutory conciliation requirement would obviously require a different inquiry because the requirement is different. In any event, petitioner does not ask for review of the evidentiary support for the EEOC's charges, or even the substance of its settlement demands.

conciliation have made clear they will not second-guess the Commission's decisions on the substance of an acceptable conciliation agreement. *See id.* 50. Other than citing a handful of decisions allegedly violating this established principle, *see id.* 50 & n.21, the Government offers no explanation why it is impossible to develop rules that police the outer boundaries of a process of genuine conciliation without invading the Commission's substantive discretion.

Indeed, in a concession that seriously undermines its categorical assertion that its compliance with its duty to conciliate is unreviewable, the Government agrees that a court can inquire whether the Commission has attempted conciliation with one employer then sued another, or seeks to litigate claims it did not attempt to conciliate, without invading the EEOC's substantive discretion. *See* U.S. Br. 53 n.23. Moreover, the Commission itself has begun to develop internal (unenforceable) guidelines to elaborate its conciliation obligation in purely procedural terms. *See* Petr. Br. 42 & n.33. A court likewise can inquire whether the Commission gave defendants reasonable time to consider a settlement demand, or the basic information they need to make an informed settlement decision, without knowing *anything* about the substance of the offer. *See* Petr. Br. 37-40.

3. The Government nonetheless attempts to argue that the Congress would not have intended judicial enforcement of the conciliation requirement because, unlike other Title VII preconditions, the conciliation provision cannot be enforced without what it ominously describes as "extensive collateral

proceedings," but what is in fact a straightforward assessment of the basic process employed by the Commission. U.S. Br. 24-25. This argument fails for multiple reasons as well.

First, the conciliation precondition is not unique in requiring a "collateral" inquiry. For example, courts frequently must decide whether to toll Title VII's time limits in light of the facts of the case and the litigation conduct of the parties. *See Zipes v. TWA, Inc.*, 455 U.S. 385, 392-97 (1982); *see also Occidental Life Insurance Company of California v. EEOC*, 432 U.S. 355, 373 (1977) (courts may grant relief if a defendant is "significantly handicapped in making his defense because of an inordinate EEOC delay" in filing suit).

Second, enforcing the conciliation obligation does not involve a "searching inquiry" under "an amorphous standard." U.S. Br. 25. It would take little effort, for example, to determine whether the Commission has explained the basis of its monetary demands or identified the claimants for whom it seeks relief. *See* Petr. Br. 39-40. While concerns about unduly complicated collateral proceedings might inform how courts (or EEOC regulations) construe the content of the conciliation obligation, they provide no basis to conclude that Congress intended no court to enforce *any* conciliation requirement, no matter how straight-forward.

Finally, even if the Government can hypothesize reasons why Congress *could* have treated conciliation differently from the other preconditions, the fact remains that the text of Title VII draws no such distinction. That uniform textual treatment strongly suggests that Congress did not view the conciliation

requirement as uniquely incompatible with judicial enforcement.

B. The Confidentiality Provisions Do Not Demonstrate That Congress Intended To Preclude Judicial Enforcement Of The Conciliation Precondition.

The Government is also wrong in arguing that Title VII's confidentiality provisions are incompatible with judicial enforcement of the conciliation precondition. Rather than read the confidentiality provisions as rendering the conciliation obligation essentially precatory, the Court should adopt an interpretation that gives meaningful effect to all of the statute's provisions. *See, e.g.*, *Duncan v. Walker*, 533 U.S. 167, 174 (2001).

1. The Government does not dispute that placing conciliation information under seal would permit effective enforcement of the precondition while also complying with the statute's prohibition against the Commission making conciliation information public. The most it can say is that filing information under seal is unusual. U.S. Br. 26. But it is no more unusual than the confidentiality provision itself. And reading a confidentiality provision to require that information be placed under seal is far less surprising than reading it to preclude, *sub silentio*, enforcement of a condition precedent to suit and any meaningful review of agency action.

Nor does the provision's prohibition against using anything "said or done during" conciliation "as evidence in a subsequent proceeding," 42 U.S.C. § 2000e-5(b), indicate that Congress intended to preclude judicial review. The Government accepts

that the confidentiality provision was part of the original statute under which suits could only be brought by private parties, who had no duty to conciliate. U.S. Br. 29-30; Petr. Br. 28-29. Consequently, when Congress made conciliation a precondition to EEOC suit in 1972, the confidentiality provision's only function was to prohibit using conciliation information to prove or disprove discrimination. Petr. Br. 28-29.

The Government suggests to the contrary that even prior to 1972, the confidentiality provision served a broader purpose by precluding employers' attempts to assert conciliation defenses to private suits. *See* U.S. Br. 27 n.7, 30. But the Solicitor General's citations do not remotely support that assertion. The Government relies on a handful of cases arising at a time when the EEOC was so understaffed and overburdened that it routinely issued right-to-sue letters before attempting any conciliation. In a number of those cases, employers attempted to defend against the subsequent private suits by claiming that the Commission had failed to engage in any conciliation effort at all. Because the defense was a complete lack of conciliation, and because the lack of conciliation was generally undisputed, so far as can be determined, none of the employers in those cases attempted to introduce anything "said or done" during conciliation as part of their defense. *See, e.g.*, *Miller v. Int'l Paper Co.*, 408 F.2d 283, 288-89 & n. 24 (5th Cir. 1969) (collecting cases); *Dent v. St. Louis-San Francisco Ry. Co.*, 406 F.2d 399, 401 (5th Cir. 1969); *Johnson v. Seaboard Air Line R. Co.*, 405 F.2d 645, 647 (4th Cir. 1968);

Choate v. Caterpillar Tractor Co., 402 F.2d 357, 358 (7th Cir. 1968).

Moreover, the courts of appeals uniformly rejected conciliation defenses against private plaintiffs, not on the ground that the confidentiality provision precluded them, but rather because the statute unambiguously failed to condition the private right to sue on the Commission's fulfillment of its conciliation obligation and because it made no sense to make the complainant "the innocent victim of a dereliction of statutory duty on the part of the Commission." *Dent*, 406 F.2d at 403 (quoting *Choate*, 402 F.2d at 361); *see also Miller*, 408 F.2d at 290; *Johnson*, 405 F.2d at 648-53. There is no reason to believe that Congress enacted the confidentiality provisions to preclude a near-frivolous defense foreclosed by other language in the statute and simple common sense.[4]

The Government must, then, show that Congress nonetheless intended the confidentiality provisions to take on an expanded role after 1972, performing one additional, peculiar function: precluding enforcement of the just-enacted conciliation precondition. But the Government can make no such showing. At best, the Government's brief suggests that Congress gave little thought to the interplay between the confidentiality

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[4] The Government's interpretation would also make it difficult to implement this Court's decision in *Ford Motor Company v. EEOC*, 458 U.S. 219, 228 (1982) – which adopted a rule that "toll[s] the further accrual of backpay liability if the defendant offers the claimant the job originally sought" – when the offer was made during conciliation.

provision and enforcement of the conciliation precondition. But that hardly suffices to overcome the presumption of enforceability or justifies rejecting a reading that allows both sets of provisions to play a meaningful role in the statute.

2. In any event, because confidentiality is waivable, it does not preclude judicial review of the EEOC's compliance with the conciliation precondition. *See* Petr. Br. 30-33.

The Government quibbles with petitioner's statement that confidentiality can be "deemed waived" by a defendant when it asserts a conciliation defense, noting that the statute requires the waiver to be "in writing." U.S. Br. 28. However, as to the defendant, the filing of a written motion to dismiss or for summary judgment is sufficient. Even if not, the Court can make clear that the motion must be accompanied by an express waiver statement.

The Government also says that a defendant's willingness to waive confidentiality "does not mean that the Commission or the charging party consents." *Id.* 28. But petitioner never suggested otherwise. Instead, because proving satisfaction of the conciliation precondition is the EEOC's burden, it must either file sufficient waivers of confidentiality or have its case dismissed for lack of proof. *See* Petr. Br. 30-31.[5] The Government makes no attempt to explain why that reasoning is wrong.

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[5] To the extent private claimants are involved in the conciliation, it is entirely appropriate to require them to cooperate with the EEOC's prosecution of the case by waiving confidentiality if they wish the case to proceed.

3. Nothing in petitioner's interpretation conflicts with the purpose of the confidentiality provisions. The Government says that "judicial review of the Commission's conciliation efforts subverts" Congress's "goal to protect the confidentiality of conciliation talks so the parties could communicate openly without fear that doing so would prejudice them in litigation." U.S. Br. 29. But that goal is met by prohibiting use of what was said or done in conciliation to prove or disprove the merits of a discrimination claim, consistent with the federal rule of evidence designed to promote the same end. *See* Fed. R. Evid. 408(a). On the other hand, allowing courts to review some limited conciliation information to decide whether the EEOC has undertaken the minimal steps necessary to permit genuine conciliation directly *advances* the fundamental purposes of the statute.[6]

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[6] In addition, there is scant evidence Congress was concerned about protecting the EEOC from public scrutiny of its conciliation conduct. *See generally EEOC v. Associated Dry Goods*, 449 U.S. 590, 596, 599-600 (1981). By its terms, the statute only prohibits the Commission and its employees, not employers, from publicly disclosing what is said or done in conciliation. 42 U.S.C. § 2000e-5(b); *see also* 42 U.S.C. § 2000e-8(e) (prohibiting Commission employees from publicly disclosing results of investigation prior to suit). The statute likewise permits using conciliation information as evidence with the written consent of the "persons concerned," 42 U.S.C. § 2000e-5(b), a term that is used pervasively in the statute to refer to claimants and potential defendants, not the Commission, which is referred to by name, *see id.* § 2000e-5.

C. The Statutory History Does Not Support The Government's Interpretation.

The Government argues that the 1972 amendments were enacted against the backdrop of "existing law" under which "conciliation had not been subject to judicial review." U.S. Br. 30. But that mixes apples and oranges. Existing law had simply held that failure to conciliate was no defense against *private* litigation, because Congress had failed to make conciliation a precondition to private suits. *See supra* pp. 11-12. To the extent Congress was aware of these decisions, it would have understood that their necessary implication was that if Congress *had* made conciliation a precondition to litigation, the courts *would have* reviewed the EEOC's compliance with the conciliation mandate.

III. The Government's APA Argument Is Irrelevant And Meritless.

The Government asserts that under "basic principles of administrative law, the Commission's conciliation process is not reviewable because it is not final agency action" under the Administrative Procedure Act. U.S. Br. 32. That argument gets the Government nowhere, for two reasons.

First, the Government's APA musings are entirely beside the point. The Solicitor General's claim that "petitioner does not contend that Title VII itself provides for judicial review of the Commission's conciliation process," U.S. Br. 32-33 n.11, is inexplicable. That is *exactly* what petitioner has argued: Title VII expressly makes conciliation a condition precedent to suit and it is well established that courts may enforce such conditions in the

normal course of adjudicating a statutory claim. Enforcement of these preconditions arises not from any principle of administrative law but rather from the unremarkable presumption that when Congress requires that certain acts be taken prior to commencement of litigation, failure to satisfy the precondition bars the suit. *See* Petr. Br. 18-22; *United States v. Zucca*, 351 U.S. 91 (1956) (enforcing condition precedent to Government denaturalization suit without any reference to administrative law).

Second, even if the APA shed light on the question presented, it would not help the Government, which focuses on the wrong agency action. The question would not be, as the Solicitor General contends, whether "the Commission's conciliation process" standing in isolation constitutes final agency action or failure to act. U.S. Br. 32. Rather, the question would be whether filing suit without having satisfied the conciliation precondition is reviewable as final agency action taken "without observance of procedure required by law." 5 U.S.C. § 706(2)(D). It would be. Filing a complaint is an "agency action." *See FTC v. Standard Oil Co. of Calif.*, 449 U.S. 232, 238 n.7 (1980) ("We agree with [respondent] and the Court of Appeals that issuance of the complaint is 'agency action.'"); *AT&T v. EEOC*, 270 F.3d 973, 976 (D.C. Cir. 2001) (same). And when filing a complaint constitutes the culmination of the agency's investigative or adjudicative process, it is *final* agency action. *See, e.g.*, *AT&T v. EEOC*, 270 F.3d at 977 ("[T]here clearly would be final agency action if the Commission filed a lawsuit against AT&T."); *cf. Standard Oil Co. of Calif.*, 449 U.S. at 239-45 (holding that filing of an *administrative*

complaint was not final agency action because it would be followed by further administrative proceedings, but noting that upon completion of the proceedings, the administrative decision may be subject to judicial challenge for failure to satisfy a precondition to filing the administrative complaint).[7]

Of course, such an APA question would never actually arise because anyone sued by an agency "will simply defend itself against the suit" rather than bringing a separate APA claim. *AT&T v. EEOC*, 270 F.3d at 975. But that simply shows that the Government's APA argument is pointless as well as wrong.

IV. Judicial Enforcement Of The Conciliation Precondition Does Not Harm Title VII Enforcement.

The parties agree that Congress strongly preferred that Title VII claims be resolved through conciliation and voluntary compliance rather than litigation. Conciliation agreements "bring[] defendants into 'voluntary compliance' and end[] discrimination far more quickly than could [EEOC] litigation proceeding at its often ponderous pace." *Ford Motor Co.*, 458 U.S. at 228. They conserve Commission resources and allow employers to resolve claims quickly and confidentially, when the publicity of litigation might otherwise compel them to fight to

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[7] As previously explained, the conciliation requirement is not so vague as to constitute a matter committed to agency discretion by law. *See supra* pp. 4-7.

clear the company's name. *See Associated Dry Goods*, 449 U.S. at 600 n.16.

None of these benefits can accrue unless the Commission engages in good faith, genuine conciliation efforts. The Government does not dispute, for example, that the fiduciary duty an employer (or its insurer) owes its shareholders precludes simply acceding to EEOC demands, particularly for large sums of money, absent basic information about the Commission's claims. *See* Am. Insurance Ass'n Br. 3, 5-6 (explaining that "an insurer needs the EEOC's help before it can authorize payment, due to insurers' fiduciary obligations to their stockholders and legal obligations to regulators not to pay claims unless there are sufficient indicia that they have merit").

The United States nonetheless insists that judicial enforcement of the conciliation requirement is entirely unnecessary and, in fact, would impede Title VII enforcement. U.S. Br. 39-48. Both claims are wrong, belied by the experience in the great majority of the country under federal appellate decisions that have long deemed the conciliation duty enforceable.

1. There is reason to doubt the Government's assertion that the EEOC can be trusted to engage consistently in good faith conciliation without any judicial supervision. *See* Petr. Br. 46-49; Retail Lit. Ctr. Br. § I.A; EEAC Br. § II; Am. Insurance Ass'n Br. 7-10. But more importantly, the very fact that Congress made conciliation a statutory requirement demonstrates that *Congress* did not believe that the Commission's employees should be left to their own devices. As the Government notes (Br. 30-31),

settlement negotiations are almost always a matter left to agency discretion – agency officials are allowed to decide for themselves whether to attempt informal settlement and can choose to file suit and negotiate later on a case-by-case basis. But the highly divided Congress that enacted the 1972 amendments treated the EEOC very differently, subjecting that traditional discretion to statutory control. *See* Retail Lit. Ctr. Br. 29-30. Having taken that extraordinary step, it is difficult to believe that Congress nonetheless intended to leave compliance with that limitation on agency discretion to the agency's discretion.

Indeed, everything the Government points to – available scrutiny from Congress, presidential appointment and Senate confirmation of EEOC commissioners, and the Commission's incentives to settle cases to preserve resources, U.S. Br. 46-48 – are reasons why Congress might have declined to make conciliation a mandatory precondition to suit in the first place. But Congress made a different choice. The Government may believe that Congress's distrust was unwarranted or has outlived its justification. Petitioner disagrees. But the parties' views don't matter: until the EEOC persuades Congress to revise the statute, it must operate under the restrictions Congress enacted as part of the 1972 compromise.

2. The Government is also wrong in claiming that even modest judicial involvement in policing the Commission's conciliation obligation would undermine Title VII enforcement.

The Government argues that enforcing the conciliation obligation will give employers "every incentive" to forego meaningful negotiations in favor

of stockpiling exhibits for a conciliation defense. U.S. Br. 40. After all, the Government says, employers can always settle after the suit is filed and the defense fails. *Id.* But as petitioner and its amici have explained, and the Government simply ignores because it has no answer, that strategy is fraught with risks that few employers are willing to take. One of the reasons the EEOC successfully conciliates so many of its claims – even though circuits have been enforcing the conciliation precondition for decades – is that the filing of a government lawsuit publicly accusing a company of engaging in reprehensible discrimination imposes public relations costs (in addition to significant litigation expenses) that cannot be undone by a post-suit settlement. *See* Retail Lit. Ctr. Br. 17-18.

The Government's argument also assumes that prevailing on a conciliation defense "allows employers to 'avoid liability for unlawful discrimination' because the agency should have conciliated differently." U.S. Br. 42-43 (quoting Pet. App. 2a). But in reality, a successful defense ordinarily leads to more conciliation, not evading trial altogether. *See, e.g.*, *EEOC v. Klingler*, 636 F.2d 104, 107 (5th Cir. 1981) (conciliation failure results in stay pending further conciliation); *EEOC v. Sears, Roebuck & Co.*, 650 F.2d 14, 19 (1981) (affirming dismissal without prejudice to refiling once conciliation obligation fulfilled).[8] Accordingly, the defense offers little to

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[8] Failure to satisfy a condition precedent to suit usually calls for dismissal without prejudice to refiling if the condition is later met. *See, e.g.*, *Costello v. United States*, 365 U.S. 265, 284-

employers who have no "desire to see their adversary across the negotiating table again." Pet. App. 17a.

The United States nonetheless argues that a conciliation defense is a "potent weapon" for delay, and says that this case "illustrates the point." U.S. Br. 43-46. The latter claim is based on a mischaracterization of the proceedings below. *See* Cert. Reply 3-4. More than three years after suit was filed, this case is no closer to resolution largely because of the EEOC's relentless motion practice and interlocutory appeal asserting its novel theory that the conciliation precondition is unenforceable.[9] Petitioner's discovery requests were limited and

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88 (1999) (dismissal of denaturalization proceeding due to Government's failure to satisfy precondition should be without prejudice); *Hallstrom v. Tillamook Co.*, 493 U.S. 20, 31-32 (1989) (same for private environmental suit filed in violation of notice precondition); *Criales v. American Airlines, Inc.*, 105 F.3d 93, 95 (2d Cir. 1997) (same for private Title VII suit filed before EEOC issued right-to-sue letter); *Sears, Roebuck & Co.*, 650 F.2d at 19 (same for failure to conciliate). In some instances, a court may instead issue a stay pending satisfaction of the condition. *See, e.g., Rhines v. Weber*, 544 U.S. 269, 276-77 (2005) (stay to permit exhaustion of habeas remedies); *Sears, Roebuck & Co.*, 650 F.2d at 19 (noting district court's discretion to stay rather than dismiss for conciliation failure); *see also* 42 U.S.C. § 2000e-5(f)(1). On the other hand, when the Commission's conciliation failure is particularly egregious and prejudicial, dismissal with prejudice may be appropriate. *See* Fed. R. Civ. P. 11; *cf. Occidental Life Ins. Co.* , 432 U.S. at 373 (holding that "federal courts do not lack the power to provide relief" when undue EEOC delay prejudices defendant); *EEOC v. Massey-Ferguson, Inc.*, 622 F.2d 271, 277 (7th Cir. 1980) (holding that conciliation violation is relevant to laches defense).

[9] *See* R. 20, 32, 45, 59, 60, 80.

entirely reasonable, including its sixteen inter-related requests for admission for each claimant, which EEOC was able to answer in a four-page chart that considerably narrowed the factual issues in dispute. *See* J.A. 55-59 (requests for admission); *id.* 79-81 (answers admitting, among other things, that the EEOC never informed petitioner of the basis for any of its monetary demands).[10]

In any event, enforcing *any* of Title VII's preconditions creates the possibility of meritless defenses and delay. *See, e.g.*, *Shell Oil*, 466 U.S. at 67-74 (addressing ultimately meritless objection to charge of discrimination). Congress could reasonably conclude that enforcing the conciliation mandate would avoid more delay than it caused, by ensuring a genuine opportunity for informal settlement before the EEOC resorts to what is often painfully prolonged litigation.

V. In The Absence Of EEOC Regulations, This Court Should Identify Several Principles That Elaborate The Conciliation Precondition.

As discussed, many of the Government's objections to any enforcement of the conciliation obligation arise from its complaints regarding the particular rules courts have adopted. That is, to a significant extent, a problem of the agency's own making. At any time, the Commission may issue

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[10] While petitioner initially objected to some discovery prior to resolution of the conciliation defense, it quickly dropped those objections and responded. *See* R. 42, p. 15 n.6.

regulations that, if reasonable, will displace those judicial constructions. *See Nat'l Cable & Telecom. Ass'n v. Brand X Internet Svcs.*, 545 U.S. 967, 982-83 (2005). In the meantime, petitioner has suggested a non-exhaustive list of reasonable requirements this Court could adopt based on existing case law, the statutory text, and common sense. *See* Petr. Br. 37-39. The Government's resistance to judicial enforcement of even these modest boundaries to the EEOC's discretion is unjustified.

The Government complains that "[c]ourts do not generally require civil litigants to" provide the other side in a conciliation information about their claims, "tell the other party on what terms they will settle," or abstain from "take-it-or-leave it offers." U.S. Br. 53. But that is because most civil litigants are not subject to a *statutory duty of conciliation* as a *precondition* to suit. Where Congress *has* imposed such a duty, courts have long enforced similar requirements. *See, e.g.*, *NLRB v. Acme Indust. Co.*, 385 U.S. 432, 435-36 (1967) (NLRA duty to bargain in good faith requires sharing information); *NLRB v. General Electric Co.*, 418 F.2d 736, 756-757 (2d Cir. 1969) (NLRB may find that offering "proposal on a take-it-or-leave-it basis" constitutes failure to bargain in good faith).

Other than insisting on being treated like a party free from any conciliation obligation, the Commission offers no particularized objection to most of petitioner's specific proposals. That is hardly surprising. How on earth, for example, can the EEOC object to having to tell an employer what it views as a "conciliation agreement acceptable to the Commission?" 42 U.S.C. § 2000e-5(b). Does it really

insist on the right to make the employer submit proposal after proposal until it rightly guesses what the Commission is after? Or does the EEOC want the right to declare conciliation a failure after an employer's first unsuccessful guess? And how can the Commission object to having to explain how it calculated its damages demand? After all, it will have to provide that explanation in court if the case goes to trial. The only reason to insist on the right *not* to disclose the calculation is to preserve the Commission's ability to make unsupported demands for money in the hopes that an employer will simply acquiesce, knowing that if the employer does not, the Commission can determine later what amount the law and the facts actually support.[11]

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[11] The Government does object to having to "identify every possible claimant at the conciliation stage," insisting that it should be allowed to wait to obtain that information "during conciliation or litigation." U.S. Br. 53-54 n.23. Why that information cannot be obtained during the initial investigation – during which the Commission may exercise its subpoena power to obtain "information . . . within the employer's control," *id.*, the Government does not say. In any event, at the very least, the Government has no basis for objecting to the requirement that it identify all the claimants for whom it is demanding monetary or other individualized relief. *See* Petr. Br. 39-40. The Government cannot legitimately demand money or a job for a person it does not know to exist, and no responsible company official could agree to such a demand.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

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IN THE

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MACH MINING, LLC,

Petitioner,

v.

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF *AMICUS CURIAE* OF THE AMERICAN INSURANCE ASSOCIATION IN SUPPORT OF THE PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	6
I. The Seventh Circuit Improperly Construed The Act To Forbid Judicial Review Of The EEOC's Satisfaction Of The Conciliation Obligation	6
II. In Suggesting That A Contrary Construct Of The Act Leads Defendants To Litigate Side Issues And Delay Justice, The Seventh Circuit Ignored The Interests Of Employers And Their Carriers To Settle Meritorious Claims And Reduce Their Litigation Costs	11
CONCLUSION	17

TABLE OF AUTHORITIES

CASES Page(s)

Burnett v. Grattan,
468 U.S. 42 (1984)..... 7

EEOC v. Agro Distr., LLC,
555 F.3d 462 (5th Cir. 2009)..... 17

EEOC v. Asplundh Tree Expert Co.,
340 F.3d 1256 (11th Cir. 2003)..... 7

EEOC v. Associated Dry Goods Corp.,
449 U.S. 590 (1981)..... 15

EEOC v. Bloomberg L.P.,
751 F. Supp. 2d 628 (S.D.N.Y. 2010)..... 16

EEOC v. Bloomberg L.P.,
967 F. Supp. 2d 802 (S.D.N.Y. 2013).....*passim*

EEOC v. CRST Van Expedited,
679 F.3d 657 (8th Cir. 2012)..... 13, 14, 15

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No. 07-CV-95-LRR, 2009 WL 2524402
(N.D. Iowa Aug. 13, 2009) 9, 10, 13, 15

EEOC v. Evans Fruit Co.,
872 F. Supp. 2d 1107 (E.D. Wash. 2012).. 17

EEOC v. Mach Mining, LLC,
738 F.3d 171 (7th Cir. 2013)..... 2, 3

EEOC v. Swissport Fueling, Inc.,
916 F. Supp. 2d 1005 (D. Ariz. 2013) 17

EEOC v. Target Corp.,
No. 02-C-146, 2007 WL 1461298 (E.D.
Wis. May 16, 2007) 14

Gladstone Realtors v. Bellwood,
441 U.S. 91 (1979)..... 7

TABLE OF AUTHORITIES—Continued

STATUTES

42 U.S.C. §2000e-5(b) 2

42 U.S.C. §2000e-5(f)(1) 2

OTHER AUTHORITIES

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INTEREST OF *AMICUS CURIAE*[1]

The American Insurance Association ("AIA") is a leading national trade association representing over 300 major property and casualty insurance companies that collectively underwrite more than $100 billion in property and casualty insurance nationwide. AIA members, ranging in size from small companies to the largest insurers with global operations, underwrite virtually all lines of property and casualty insurance, including employment practices liability insurance.

Employers facing discrimination lawsuits and insurance carriers writing employment practices liability insurance often face threatened litigation by the United States Equal Employment Opportunity Commission ("EEOC"). Insurers and employers facing this situation require detailed information in order to accurately set reserves and ensure that any settlement not only promptly and fairly compensates meritorious claims, but also satisfies the interests of insurance regulators. The AIA submits the Seventh Circuit's ruling is wrong as a matter of policy, since it is fundamental to the litigation process for a party to have fulsome information relative to the claims at issue. The Congressionally-mandated conciliation process was intended to provide that core knowledge. This is particularly important in EEOC-initiated litigation, where one of the government's fundamental

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[1] Counsel of record received timely notice of the intention to file this brief, and all parties have consented to the filing of this brief. Pursuant to S. Ct. Rule 37.6, the AIA states that no counsel for a party wrote this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to this brief's preparation or submission.

mandates is to achieve voluntary and informal compliance with anti-discrimination laws.

SUMMARY OF ARGUMENT

I. The Seventh Circuit's ruling forbids judicial review of the EEOC's satisfaction of its statutory obligation to conciliate discrimination claims in good faith, which undermines the ability of employers and insurers to reasonably assess settlement issues. When Congress enacted Title VII of the Civil Rights Act of 1964 ("Act"), it mandated that the EEOC engage in conciliation proceedings with employers prior to bringing lawsuits. 42 U.S.C. § 2000e-5(b), (f)(1). While the language of the Act does not specify how conciliation proceedings must be conducted or the quantum of information that must be disclosed or exchanged, it clearly requires that the EEOC engage in good faith proceedings *before* bringing lawsuits. *Id.* Congress enacted this requirement in the interests of judicial economy, providing both the EEOC and employers with an avenue to resolve disputes confidentially, voluntarily, informally and without burdening the dockets of federal courts.

First, contrary to this clear Congressional intent that courts have followed over the last several decades, in *EEOC v. Mach Mining, LLC*, the Seventh Circuit held that this obligation is not judicially reviewable, and that, in essence, the EEOC may skip the statutory requirement of conciliation without any consequence. 738 F.3d 171, 184 (7th Cir. 2013). The Seventh Circuit opined that "failures by the EEOC in the conciliation process simply do not support an affirmative defense for employers charged with employment discrimination." *Id.* In support of its conclusion that employers may not use failure-to-conciliate as an affirmative

defense, the Seventh Circuit noted "as a practical matter, there is little reason to expect the potential for dismissal to promote conciliation. The employer in a dismissed case has little incentive to resume talks, of course. The next employer the EEOC investigates will have seen the benefit of using the conciliation process as a strategic defense rather than a chance to settle." *Id.* at 184-85. Contrary to Congress's view that conciliation proceedings must be conducted as a vehicle to foster judicial economy, the Seventh Circuit decided that the requirement of conciliation proceedings was merely a formality that mostly benefitted employers who sought the dismissal of claims when the EEOC neglected to follow mandatory procedure.

Second, while the Seventh Circuit focused on critiquing certain employers' potential defense strategies, it failed to account for the practical realities of its holding. The Seventh Circuit's ruling encourages the EEOC to abstain from the procedural requirement of meaningful conciliation established by Congress and ignores the fact that employers and their insurance carriers—along with alleged victims of discrimination—have both financial and business-reputation reasons to resolve litigation as quickly and cost-efficiently as possible. In reality, an insurer needs the EEOC's help before it can authorize payment, due to insurers' fiduciary obligations to their stockholders and legal obligations to regulators not to pay claims unless there are sufficient indicia that they have merit. In this way, the Seventh Circuit failed to consider how the ruling impacts multiple constituents, including already over-burdened federal courts, which will now face more EEOC litigation; employers who face such claims; and the insurance industry, which bears the cost of defending the time-consuming and

expensive litigation through employment practices liability insurance. In short, when the EEOC cooperates, alleged victims receive compensation more quickly, whether because insurers gain some leverage over employers who are otherwise resistant to settle, or because they are better equipped to assess the EEOC's demands and litigation costs and risks.

II. A construction of the Act that places the EEOC above judicial review of whether it fulfilled conditions precedent to institution of a lawsuit—based on the Seventh Circuit's view that employers simply use the failure-to-conciliate defense for delay and non-meritorious purposes—ignores the realities of modern workplace litigation. It also flies in the face of the principal foundation of our system of government that judicial review of executive and agency compliance with the law is a bedrock principle of American constitutional separation of powers.

First, EEOC litigation imposes significant costs upon employers and their insurance carriers. Such litigation inevitably causes disruptions to businesses and distractions to management. Further, media attention to EEOC litigation[2] often harms an employer's reputation in the marketplace—not only with investors, shareholders, customers, and the public, but also with their own employees and potential applicants. An employer charged with actionable discrimination in publicly-filed court

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[2] The EEOC has been very clear that media exposure is one of its enforcement tools. The EEOC has represented that it intends to "[p]rioritize spending for the systemic initiative [since systemic cases generate substantial media and other public notice, [and] they help deter other employers from engaging in similar prohibited conduct." EEOC FY 2012 Congressional Budget Justification at 3, www.eeoc.gov/eeoc/plan/2012budget.cfm.

documents suffers from competitive disadvantages as compared to other businesses who are able to portray themselves as progressive employers-of-choice.

Second, employers and their carriers are often forced to defend lawsuits where the EEOC posits a take-it-or-leave-it settlement demand at the end of an administrative investigation and provides little to no information or documentation about its claims. Such tactics are perfectly consistent with (and, indeed, encouraged by) the Seventh Circuit's ruling below, for the EEOC's position before this Court—and as the Seventh Circuit held below—is that its conciliation efforts are beyond judicial review and federal courts are stripped of the power to enforce that obligation. However, to encourage meaningful settlement negotiations prior to the EEOC's institution of a lawsuit, both sides should have pertinent information and documentation about the claims. Employers need to know the identity of individuals whom the EEOC asserts are allegedly injured and have documentation of the specific damages the EEOC uses as the basis of its settlement demands. Conciliation efforts will be predictably futile when the EEOC does not even provide an employer with these basic metrics, including identities of the parties on whose behalf the government is suing, and a substantiation of the damages sought. Absent this information, it becomes nearly impossible for an employer to evaluate exposure and damages or make a practical, meaningful decision to resolve a claim in conciliation.

For a variety of reasons, this concern is equally applicable to carriers writing employment practices liability insurance. They require detailed information in order to accurately set reserves and ensure that any settlement not only promptly and fairly compensates

meritorious claims but also satisfies the interests of insurance market conduct regulators, who scrutinize claim files to confirm that settlements are sufficient, yet not so high that a carrier's rate filings or solvency may be called into question.

In short, the Seventh Circuit's ruling is wrong as a matter of policy, since it is fundamental to the litigation process for a party to have fulsome information relative to the claims at issue. The Congressionally-mandated conciliation process was intended to provide that core knowledge.

ARGUMENT

I. The Seventh Circuit Improperly Construed The Act To Forbid Judicial Review Of The EEOC's Satisfaction Of The Conciliation Obligation

The Seventh Circuit improperly assessed the implications of the failure-to-conciliate defense. Reducing delays, minimizing costs, and unburdening the federal court system should be the goals of our judicial system. For civil cases tried in federal court, the median time to verdict in civil cases is almost two years; it is even higher in complex matters, such as the EEOC pattern or practice lawsuit at issue here.[3] Applied to employers and insurance companies, two years of complex, case-specific discovery and the resulting legal fees engender considerable costs. EEOC pattern or practice lawsuits with discovery

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[3] *See* Admin. Office U.S. Courts, Federal Judicial Caseload Statistics 2013, Tbl C-5, http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2013/tables/C05Mar13.pdf.

about employee data, resulting in multi-year proceedings with multiple court interactions, place a heavy and unnecessary burden on the judiciary. Yet, the EEOC appears more interested in hitting its benchmarks than it is in successfully conciliating cases. Under the EEOC's Strategic Enforcement Plan, it has set annual quotas for key performance measures for its enforcement and litigation activity. *See* Gerald L. Maatman, Jr. and Christopher J. DeGroff, EEOC-Initiated Litigation: Case Law Developments In 2013 And Trends To Watch For In 2014 at 6, *available at* http://www.workplaceclassaction.com/files/2013/12/EEOC-Initiated-Litigation-Case-Law-Developments-2013-3.pdf. The agency's stated goal is to ensure that systemic cases make up 22% to 24% of its litigation docket by fiscal year 2016, with at least 20% of its annual litigation docket made up of systemic cases. *Id.* In fiscal year 2013, the EEOC continued to take strides toward that goal. According to the EEOC's final tally of litigation activity, it filed 131 merits lawsuits during fiscal year 2013. *Id.* Litigating such cases are complex and difficult while, in contrast, conciliation proceedings are relatively inexpensive, informal, and can lead to quicker resolutions. *See, e.g. Burnett v. Grattan*, 468 U.S. 42, 54 (1984); *Gladstone Realtors v. Bellwood*, 441 U.S. 91, 104 (1979). Applied to Title VII claims, this notion holds true, as intended by Congress when the legislation was drafted.

Recent decisions involving Title VII discrimination cases illuminate the Congressional intent behind the statute, even though appellate courts have recognized the importance of it for years. Conciliation is not optional and must be conducted in good faith, and the goal of conciliation is to make litigation the last resort. *See, e.g., EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1260-61 (11th Cir. 2003) (the

EEOC failed to conciliate in good faith where it gave employer only 12 business days to respond to proposed conciliation agreement and did not acknowledge defense counsel's response that arrived shortly thereafter because "[i]n its haste to file the instant lawsuit, with lurid, perhaps newsworthy allegations, the EEOC failed to fulfill its statutory duty to act in good faith to achieve conciliation, effect voluntary compliance, and to reserve judicial action as a last resort."). More recently, in *EEOC v. Bloomberg L.P.*, 967 F. Supp. 2d 802 (S.D.N.Y. 2013), the EEOC filed an action against the defendant after several current and former employees alleged sex and pregnancy discrimination. Initially, the EEOC investigated the defendant after the charging parties filed their discrimination claims. *Id.* at 806. The defendant cooperated with the investigation by providing the names of women who had taken maternity leave in the period when the discrimination was alleged. *Id.* Days later, the EEOC sent the defendant a Letter of Determination that mentioned the names of the charging parties, but no other individual claimants. *Id.* at 806, 812. The record confirmed that several non-intervening plaintiffs were not contacted by the EEOC until after the litigation was commenced. *Id.* at 813. As the litigation proceeded and more claimants were identified, the defendant offered to discuss cases of the identified individuals to determine the breadth of the grievance. *Id.* In response, the EEOC refused to conciliate any claims other than those of the charging parties. *Id.* One day after the defendant proposed to discuss individual claims, the EEOC declared the conciliation was unsuccessful, and later filed suit. *Id.*

Rejecting this approach, the court noted that "allowing the EEOC to subvert its pre-litigation

obligations with respect to individual claims by yelling far and wide about class claims would undermine the statutory policy goal of encouraging conciliation." *Id.* at 813. In other words, the court viewed conciliation requirement as a policy goal of the Act, not the mere formality functioning as a defense tactic that the Seventh Circuit uniquely believed it to be. Further, the court emphasized that the EEOC is not entitled to abandon its requirement to conciliate individual claims just because it is bringing a class-based claim. *Id.* at 814. Every individual claim must be part of a good faith conciliation process. Finally, the court held "[t]he EEOC's conduct here blatantly contravenes Title VII's emphasis on resolving disputes without resort to litigation[.]" *Id.* Thus, the court in ***EEOC v. Bloomberg*** determined that conciliation is a Congressionally-intended obligation designed to resolve disputes, not a superfluous part of the Act giving rise to a defense tactic to secure dismissals. This approach to resolving Title VII disputes is a correct construction of the Act, as opposed to the Seventh Circuit's opinion that the EEOC may sue without regard to how it meets its conciliation obligation because the obligation is not judicially reviewable.

In support of its holding, the court in ***EEOC v. Bloomberg*** cited a similar case where the EEOC did not disclose the identities of class members during its investigation and conciliation proceedings: the district court opinion in ***EEOC v. CRST***, which was later affirmed by the Eighth Circuit. There, the court held that the EEOC conducted an improper investigation and,

> To rule to the contrary would severely undermine if not completely eviscerate Title VII's integrated, multistep enforcement

> procedure, expand the power of the EEOC far beyond what Congress intended[,] and greatly increase litigation costs. To accept the EEOC's view of its own authority would also impose an untenable burden upon the federal district courts, as the EEOC might avoid administrative proceedings for the vast majority of allegedly aggrieved persons. [Further,] Congress surely did not intend that employers, even ones whose workplaces might be rife with [sex discrimination], face the moving target of allegedly aggrieved persons that [defendant] faced in both the administrative and legal phases of this dispute.

Bloomberg, at 815 (citing *EEOC v. CRST Van Expedited*, No. 07-CV-95-LRR, 2009 WL 2524402 (N.D. Iowa Aug. 13, 2009). Thus, following *EEOC v. CRST*, the court in *EEOC v. Bloomberg* held that Congress's intent in enacting Title VII was for parties to resolve disputes in conciliation proceedings that follow proper investigations by the EEOC, as opposed to costly post-suit litigation that unfairly burdens defendants when the EEOC refuses to identify the allegedly injured persons on whose behalf it is bringing suit, and instead seeks to modify such a class throughout the discovery process. In sum, conciliation proceedings lead to the least burdensome and most efficient means of resolving disputes, especially if they are conducted following proper EEOC investigations.

II. In Suggesting That A Contrary Construct Of The Act Leads Defendants To Litigate Side Issues And Delay Justice, The Seventh Circuit Ignored The Interests Of Employers And Their Carriers To Settle Meritorious Claims And Reduce Their Litigation Costs

Litigation in modern American courts is expensive and time-consuming. The time and money businesses expend on litigation detracts from their core mission of delivering goods and services to their customers. Corporate reputations also are impacted by the extent to which businesses remedy any injury they allegedly have caused, including to applicants or employees in Title VII litigation; confidential settlement of such claims is often far preferable to massive jury verdicts pinning liability on an employer for violation of the Act. The same is true for the insurance industry, for reducing the duration and costs of litigation and otherwise making the defense of claims as cost-efficient as possible are at the heart of sound insurance practices.

With these standards in mind, conciliation proceedings work best when all relevant information is shared in good faith and when the parties are making decisions on the same set of facts. The Seventh Circuit did not delineate the type or quantum of information that the EEOC should provide to employers to facilitate good faith conciliation proceedings. It simply construed the Act to hold that such activity is not judicially reviewable, and that the EEOC can be trusted to fulfill its statutory duty to conciliate—at all time, in all circumstances, and in all cases. Experience shows, however, that agency conduct not

subject to review can be influenced negatively by the lack of meaningful judicial oversight.

Decisions from other courts do provide guidance as to how this mandatory process can be productive in order to reduce litigation costs. In *EEOC v. Bloomberg*, the court noted that the EEOC has the autonomy to bring additional claims if they are reasonably related to the claim it had investigated, but:

> The Court is not aware of any binding legal authority, and the EEOC has provided none, that allows the EEOC to level broad accusations of class-wide discrimination to present [defendant] with a moving target of prospective plaintiffs and, after unsuccessfully pursuing pattern-or-practice claims, substitute its own investigation with the fruits of discovery to identify which members of the class, none of whom were discussed specifically during conciliation, might have legitimate individual claims[.]

967 F. Supp. 2d at 814. Thus, the court in *EEOC v. Bloomberg* held that the EEOC's conduct violated Congressional intent. *Id.* The court determined that it was improper to use a lawsuit to identify potential plaintiffs through discovery at the defendant's expense. *Id.* The court ruled that a thorough pre-suit investigation would likely have resulted in the identification of potential injured persons. Hence, a detailed pre-suit investigation is completely consistent with Congress's intent when it enacted Title VII. The undeniable goal of Title VII is to resolve disputes short of litigation. This stands in stark contrast to the Seventh Circuit's ruling that the EEOC's conciliation efforts are not subject to judicial review.

In addition, the court in *EEOC v. Bloomberg* held that the EEOC's pre-litigation conduct failed to meet the Act's requirements because it did not make the requisite reasonable cause determinations regarding the non-intervening plaintiffs. *Id.* at 814. The EEOC failed to afford the defendant a reasonable opportunity to conciliate by "[refusing] to disclose to the defendant the identity of any potential class members during the course of its investigation or conciliation efforts or even engage in a discussion of any individual claims it might late bring on behalf of class members[.]" *Id.* at 815. Finally, citing *EEOC v. CRST*, the court held "the EEOC's actions—or more appropriately, inaction—'foreclosed any possibility that the parties might settle all or some of this dispute without the expense of a federal lawsuit,' as Title VII prefers." *Id.* at 815-16 (citations omitted). Thus, the court found that Title VII's statutory framework demonstrated that Congress preferred that parties settle disputes and avoid expensive litigation, and this ideal could not be reasonably attained when the EEOC conciliates in bad faith by refusing to identify class members to the party who is supposed to defend themselves against them.

EEOC v. CRST, 679 F.3d 657 (8th Cir. 2012), illustrates the perverse results that follow from the Seventh Circuit's decision. In *EEOC v. CRST*, the EEOC sued an employer trucking company for violating Title VII, alleging the defendant was responsible for the severe and pervasive sexual harassment of female long-haul drivers in its New-Driver Training program. The district court granted the defendant summary judgment as to three claimants as well as the EEOC; granted the employer summary judgment as to certain claims; barred the EEOC from seeking relief for the remaining claimants based on its failure to reasonably investigate or good

faith conciliate; and granted the employer's motion for attorneys' fees. *Id.* The EEOC appealed these holdings. *Id.*

In relevant part, the Eighth Circuit noted that "from the date that the EEOC filed suit, until nearly two years thereafter, the EEOC did not identify the women comprising the putative class despite the district court's and CRST's repeated requests to do so." *Id.* at 669. The Eighth Circuit thus held that the EEOC was barred from bringing claims for 67 of the female claimants as it did not investigate their claims, but rather used discovery to identify claimants, and thus did not attempt to conciliate their claims prior to filing a complaint. *Id.* at 673-74. The Eighth Circuit ruled that although the EEOC is permitted to seek relief for individuals beyond the charging parties, it must investigate—and conciliate—the claims of such persons during the course of its investigation, as opposed to in discovery after filing a lawsuit. *Id.* at 674. Thus, the EEOC "may not use discovery in the resulting lawsuit 'as a fishing expedition' to uncover more violations." *Id.* at 675 (citing ***EEOC v. Target Corp.***, No. 02-C-146, 2007 WL 1461298 (E.D. Wis. May 16, 2007)).

In reaching its conclusion that the EEOC conducted a "fishing expedition" to uncover potential wrong-doings, the Eighth Circuit analyzed several factors: the EEOC's letter of determination did not provide the defendant with any notice as to the size of the class of allegedly injured employees; it did not provide the names of all class members or the number of "similarly-situated" employees; and the EEOC's sending of thousands of solicitation letters to former employees over the course of several months, which created "a clear and present danger that this case

would drag on for years as the EEOC conducted wide-ranging discovery and continued to identify allegedly aggrieved persons [a] strategy [that] was untenable . [and defendant] faced a continuously moving target of allegedly aggrieved persons, the risk of never-ending discovery, and indefinite continuance of trial." *Id.* at 676 (citing *EEOC v. CRST Van Expedited*, No. 07-CV-95-LRR, 2009 WL 2524402 (N.D. Iowa Aug. 13, 2009)). The Eighth Circuit held that "absent an investigation and reasonable cause determination apprising the employer of the charges lodged against it, the employer has no meaningful opportunity to conciliate." *Id.*

As *EEOC v. CRST* aptly demonstrates, fulsome conciliation is the most cost-effective and expeditious means to resolve disputes for all interested parties. The process works best when the EEOC gives employers a meaningful opportunity to conciliate by providing them with the critical facts when it is asked to do so. Employers must be provided the identities of the claimants as well as a substantiation of their damages in order for the process to work. If the EEOC may demand substantial dollars and not explain the basis for its demand, conciliation will be fruitless, as parties and insurers will be unable to make meaningful risk calculations. *See EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 601 (1981) ("A party is far more likely to settle when he has enough information to be able to assess the strengths and weaknesses of his opponent's case as well as his own."). If the EEOC is allowed to render the conciliation process ineffectual, it is essentially being given the freedom to dispense with Congress's mandate to try and avoid litigation.

Beyond the identity of claimants, employers and their carriers also have an interest knowing what their alleged damages are in order to conciliate in a meaningful manner. A defendant in any litigation needs to know the extent of the plaintiff's damages before an intelligent settlement assessment can be made. In *EEOC v. Bloomberg*, the EEOC requested roughly $41 million in damages from the defendant. *See* 751 F. Supp. 2d 628, 641 (S.D.N.Y. 2010). When the defendant offered to discuss with the EEOC how it determined the amount of damages it requested, the EEOC refused to engage in discussions and merely asserted "that it had interviewed a 'fair number' of women and then extrapolated from those interviews an amount it determined was acceptable for the class claim pool." *Id.* The court held that this non-substantive conciliation effort did not afford the defendant a reasonable opportunity to make a counter-offer. *Id.* at 641-42.

In granting the defendant's motion for summary judgment, the court concluded "that the EEOC's position, in these circumstances, does not embody a 'reasonable and flexible' response to the 'reasonable attitudes' of the employer." *Id.* at 642. In other words, the court noted, it was reasonable for the defendant to inquire into how the EEOC arrived at its monetary demand figure, and the EEOC's refusal to engage in such discussions was problematic. *Id.* The court concluded "in a complex case like this one, the EEOC cannot, when the employer reasonably asks for information to formulate a monetary counteroffer, make substantial monetary demands and require employers simply to pony up or face a lawsuit." *Id.* In essence, the EEOC's strategy of a take-it-or-leave it demand—with the threat of a lawsuit systemically attacking an employer's policies and practices—is

entirely inconsistent with the purpose and goal of the Act. *See EEOC v. Agro Distr., LLC*, 555 F.3d 462, 468 (5th Cir. 2009) (finding that the EEOC made an "unsupportable demand for compensatory damages as a weapon to force settlement"). Thus, in order for conciliation to serve its purpose, the EEOC must comply with an employer's requests regarding the substantiation of the monetary figures the EEOC demands. *See EEOC v. Evans Fruit Co.*, 872 F. Supp. 2d 1107, 1114 (E.D. Wash. 2012) (the EEOC demanded $1 million for an unspecified class of female employees who allegedly had been harassed, and after the employer asked for information about the claims and the damages, the EEOC abruptly ended conciliation and filed its lawsuit); *EEOC v. Swissport Fueling, Inc.*, 916 F. Supp. 2d 1005, 1043 (D. Ariz. 2013) (criticizing the EEOC for its failure to provide the employer with the basis for the Commission's calculations of damages in its pre-lawsuit conciliation demand, thereby making its proposal neither reasonable nor bona fide). The Seventh Circuit's decision subverts the requirements of the Act and should be reversed.

CONCLUSION

The Seventh Circuit's unprecedented ruling that the EEOC may essentially conciliate in bad faith and subsequently litigate as it pleases is contrary to the Congressional intent of Title VII. By specifically mandating that parties engage in conciliation before proceeding to litigation, Congress recognized that post-investigation litigation is burdensome to the courts and costly to litigants and their constituents, such as insurance companies who insure and defend employers. Conciliation is effective when the EEOC provides employers with fundamental information regarding the identities of allegedly injured persons

and the injuries they claim. If the Act is construed to the contrary, the EEOC is allowed to implement the mandatory conciliation process without judicial review, and meaningful settlement talks will quickly evaporate into what will soon become a storm of discovery and expensive litigation. The adverse effects of the Seventh Circuit's holding, if left uncorrected, will be felt by the EEOC, injured victims of job bias, employers, and insurance carriers.

The disparity of views as to how to assess conciliation demonstrates there may not be one correct answer. However, allowing for judicial review of conciliation is the best approach, since it encourages the EEOC to conduct thorough, good faith investigations that will lead to more fruitful conciliation proceedings. Thus, the two arguments presented here offer a pragmatic formula for resolving disputes in a manner that is conscious of both judicial economy and the needs of the insurance industry, which manages and underwrites much of the employment practices litigation against businesses in America.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In the Supreme Court of the United States

MACH MINING, LLC,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE STATES OF ARIZONA, HAWAII, ILLINOIS, AND WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. *Mach Mining's* Bright-Line Rule Brings Predictability Where Widely Divergent Decisions Distract the EEOC, FEPAs, District Courts, and Employers from Addressing the Merits of Agency Discrimination Claims. 5

II. Affirming the Seventh Circuit's Bright-Line Rule and Rejecting the Implied Affirmative Defense Will Bring Predictability Without Sacrificing the Opportunity for Conciliation. 17

CONCLUSION 22

TABLE OF AUTHORITIES

Cases

Bodett v. Cox Commc'n Inc.,
366 F.3d 736 (9th Cir. 2004) 3

Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.,
467 U.S. 837 (1984) 6

Doe v. Oberweis Dairy,
456 F.3d 704 (7th Cir. 2006) 16

EEOC v. Alia Corp.,
842 F. Supp. 2d 1243 (E.D. Cal. 2012) 11

EEOC v. Asplundh Tree Expert Co.,
340 F.3d 1256 (11th Cir. 2003) 7

EEOC v. Bass Pro Outdoor World, LLC,
4:11-CV-3425, 2014 WL 3795579 (S.D. Tex. July 30, 2014) 9

EEOC v. Bloomberg LP,
751 F.Supp.2d 628 (S.D.N.Y. 2010) 9

EEOC v. Commercial Office Products Co.,
486 U.S. 107 (1988) 1

EEOC v. CRST Van Expedited, Inc.,
679 F.3d 657 (8th Cir. 2012) 13

EEOC v. Crye-Leike, Inc.,
800 F. Supp. 2d 1009 (E.D. Ark. 2011) 10

EEOC v. Evans Fruit Co.,
872 F. Supp. 2d 1107 (E.D. Wash. 2012) 11, 12

EEOC v. Harvey L. Walner & Assoc's,
91 F.3d 963 (7th Cir. 1996) 8

EEOC v. Johnson & Higgins, Inc.,
91 F.3d 1529 (2d Cir. 1996) 7

EEOC v. Keco Indus., Inc.,
748 F.2d 1097 (6th Cir. 1984) 7

EEOC v. Klingler Elec. Corp.,
636 F.2d 104 (5th Cir. 1981) 7

EEOC v. Mach Min., LLC,
738 F.3d 171 (7th Cir. 2013) *passim*

EEOC v. New Prime, Inc.,
6:11-CV-03367-MDH, 2014 WL 4060305, ---F. Supp. 2d --- (W.D. Mo. Aug. 14, 2014) 11

EEOC v. One Bratenahl Place Condo. Ass'n,
644 F.Supp. 218 (N.D. Ohio 1986) 11

EEOC v. PBM Graphics Inc.,
877 F. Supp. 2d 334 (M.D. N.C. 2012) 8

EEOC v. Propak Logistics, Inc.,
746 F.3d 145 (4th Cir. 2014) 12

EEOC v. Radiator Specialty Co.,
610 F.2d 178 (4th Cir. 1979) 7

EEOC v. Riverview Animal Clinic, PC,
761 F.Supp.2d 1296 (N.D. Ala. 2010) 9, 10

EEOC v. Shell Oil Co.,
466 U.S. 54 (1984) 6

EEOC v. Supervalu, Inc.,
674 F Supp. 2d 1007 (N.D. Ill. 2009) 8

EEOC v. Swissport Fueling, Inc.,
916 F Supp. 2d 1005 (D. Ariz. 2013) 8, 9, 11

EEOC v. United Parcel Serv.,
860 F.2d 372 (10th Cir. 1988) 8

EEOC v. Zia Co.,
582 F.2d 527 (10th Cir. 1978) 7

Higdon v. Evergreen Int'l Airlines, Inc.,
673 P.2d 907 (Ariz. 1983) 3

New York Gaslight Club, Inc. v. Carey,
447 U.S. 54 (1980) 1

Statutes

29 C.F.R. § 1601.70 1

29 C.F.R. § 1601.74 2

42 U.S.C. § 2000e–5(b) 3, 6, 20

42 U.S.C. § 2000e–5(f)(1) 6, 7

42 U.S.C. § 2000e-8(b) 1

42 U.S.C. §§ 2000e to 2000e-17 1

5 Me. Rev. Stat. § 4612(3) 2

Ariz. Rev. Stat. §§ 41-1461–65 2

Ariz. Rev. Stat. § 41-1481(B) 2

Ariz. Rev. Stat. § 41-1481(D) 3

Ariz. Rev. Stat. § 41-1481(J) 16

Ariz. Rev. Stat. § 41-1491.34 17

Cal. Gov. Code § 12963.7 2

Colo. Rev. Stat. Ann. § 24-34-306(2)(b)(II) 2

Haw. Rev. Stat. § 368-13(d) 2

Haw. Rev. Stat. § 378-2 2

Haw. Rev. Stat. § 378-2(a)(1) 17

Idaho Code § 67-5907 2

Kan. Stat. Ann. § 44-1005(e) 2

Mo. Ann. Stat. § 213.075(3) 2

Neb. Rev. Stat. § 48-1118(1) 2

Other Authorities

110 Cong. Rec. 7205 (1964) 1

2 *Def. of Equal Emp. Claims* § 13:17 (2014) 14

H.R. Rep. No 92-899 (1972) 6, 7

Harassment Charges, EEOC and FEPA Combined: FY 1997 FY 2011 1

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Press Release, EEOC, *HiLine Electric to Pay $210,000 to Settle EEOC Age Discrimination Suit* (Oct. 6, 2014) 15

INTEREST OF *AMICI CURIAE*

Amici Curiae, the States of Arizona, Hawaii, Illinois, and Washington (the "*Amici* States") have a strong interest in effective enforcement of Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e to 2000e-17, and of state anti-discrimination laws that parallel Title VII. To avoid unnecessary duplication of efforts and provide for the prompt resolution of charges, the EEOC enters into worksharing agreements with state and local agencies. 42 U.S.C. § 2000e-8(b); *EEOC v. Commercial Office Products Co.*, 486 U.S. 107, 122 (1988) (noting that Title VII supports worksharing agreements to avoid "unnecessary duplication of effort or waste of time"). State and local agencies must meet standards of capability, performance, and compatibility with EEOC's charge processing systems and methods to be designated as Fair Employment Practice Agencies ("FEPAs"). 29 C.F.R. § 1601.70; *see also New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 63–64 (1980) ("Congress envisioned that Title VII's procedures and remedies would 'mesh nicely, logically, and coherently with the State and city legislation,' and that remedying employment discrimination would be an area in which '[t]he Federal Government and the State governments could cooperate effectively.'") (quoting 110 Cong. Rec. 7205 (1964) (remarks of Sen. Clark)). The EEOC and FEPAs work together to investigate charges of discrimination and, when possible, conciliate charges of discrimination.[1] For example, the Arizona Civil Rights Division ("ACRD"), Hawaii Department of Labor

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[1] *See, e.g., Harassment Charges, EEOC and FEPA Combined: FY 1997 FY 2011*, http://www.eeoc.gov/eeoc/statistics/enforcement/harassment.cfm (last visited Oct. 27, 2014).

and Industrial Relations, Illinois Department of Human Rights, and Washington Human Rights Commission, having met these standards, are designated FEPAs. 29 C.F.R. § 1601.74 (listing designated FEPAs that include forty-six state agencies as well as many city agencies).

The ACRD enforces the Arizona Civil Rights Act ("ACRA") that has numerous provisions that parallel Title VII provisions. *See* Ariz. Rev. Stat. §§ 41-1461–65. Other *Amici* States have laws that parallel Title VII provisions. *See, e.g.*, Haw. Rev. Stat. § 378-2. Similar to the enforcement procedures under Title VII, once the ACRD determines that reasonable cause exists, it shall "endeavor to eliminate the alleged unlawful employment practice by informal methods of conference, conciliation and persuasion." Ariz. Rev. Stat. § 41-1481(B); *see also* Haw. Rev. Stat. § 368-13(d) (same).[2] "Nothing said or done during and as a part of these informal endeavors may be made public by the [ACRD]."[3] Ariz. Rev. Stat. § 41-1481(B). If the ACRD "has not accepted a conciliation agreement to which the

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[2] Numerous state employment discrimination laws include provisions that the FEPA will "endeavor to eliminate" the discriminatory or unfair practice by "conference, conciliation, and persuasion" after a reasonable, substantial, or probable cause determination. *See, e.g.*, Colo. Rev. Stat. Ann. § 24-34-306(2)(b)(II); Cal. Gov. Code § 12963.7; Idaho Code § 67-5907; Kan. Stat. Ann. § 44-1005(e); 5 Me. Rev. Stat. § 4612(3); Mo. Ann. Stat. § 213.075(3); Neb. Rev. Stat. § 48-1118(1).

[3] Other state employment discrimination laws also parallel the requirement for the FEPA to keep confidential the information shared during conciliation. *See, e.g.*, Cal. Gov. Code § 12963.7; 5 Me. Rev. Stat. § 4612(3); Neb. Rev. Stat. § 48-1118(1).

respondent and the charging party are parties" within thirty days of issuing the cause determination, the ARCD may bring suit to eradicate unlawful employment practices. Ariz. Rev. Stat. § 41-1481(D). Although several differences exist, the ACRA is "generally identical" to Title VII, and therefore Title VII case law can be persuasive in interpreting portions of the ACRA. *Bodett v. Cox Commc'n Inc.*, 366 F.3d 736, 742 (9th Cir. 2004) (quoting *Higdon v. Evergreen Int'l Airlines, Inc.*, 673 P.2d 907, 909-10 n. 3 (Ariz. 1983)).

Because the *Amici* States work with EEOC to eliminate discrimination in the workplace and have state provisions that parallel Title VII's conciliation requirement, they have a compelling interest in having this Court affirm the Seventh Circuit's bright-line rule and hold that EEOC's conciliation efforts are not subject to judicial review.

SUMMARY OF ARGUMENT

The Seventh Circuit applied the unambiguous language of 42 U.S.C. § 2000e–5(b) and correctly adopted a bright-line test for judicial review of conciliation. *EEOC v. Mach Min., LLC*, 738 F.3d 171, 184 (7th Cir. 2013). Under this bright-line rule, if the EEOC has pled on the face of its complaint that it has complied with all procedures required under Title VII and the relevant documents are facially sufficient, no additional judicial review is required. *Id.*

The Seventh Circuit's statutory interpretation is consistent with Title VII's purpose because judicial review of conciliation efforts does not promote the elimination of unlawful employment practices through

informal processes prior to suit. Rather, the "failure to conciliate" defense: (1) leads to divergent views on the sufficiency of agency conciliation as a matter of law and ad hoc notions of reasonableness that are difficult to apply more broadly, (2) holds the EEOC and FEPAs accountable retroactively for new requirements, and (3) encourages employers to test the legal boundaries of the defense without risk

Under these conditions, judicial review of conciliation creates an incentive for employers to allow the suit to go forward no matter how diligently the EEOC, or state agencies similarly charged with ending employment discrimination, engage in the conciliation process. This incentive becomes more powerful the greater the potential liability and the amount sought in settlement. Whether employers tactically undermine the conciliation process, simply refuse to allow it to succeed, or find fault in the EEOC not accepting their proposal, the potential to find flaws in the conciliation process gives employers an opportunity to absolve their alleged unlawful actions before the merits of the case can be presented. This result clashes with Title VII's purpose to eradicate discrimination.

Affirming the Seventh Circuit's bright-line rule and rejecting the implied affirmative defense will bring predictability without sacrificing the opportunity for employers to conciliate. Voluntary compliance through conciliation ends discriminatory practices and provides victim-specific relief more expediently and without the risks involved in litigation. Moreover, the implied, affirmative failure-to-conciliate defense obstructs—rather than promotes—meaningful conciliation because it creates an environment that is not conducive to

settlement. Judicial review of conciliation strips the proceedings of those elements that make settlement work: the confidential treatment of offers, counteroffers, and communications; the exchange of information guided by ethical obligations, practical considerations, and strategy; and an understanding that neither party risks dismissal of the merits of their claim if they do not accept a proposal. Judicial review is thus contrary to Congress's express determination that conciliation communications must be confidential and the EEOC has the discretion to determine whether a conciliation agreement is acceptable.

The EEOC and FEPAs have powerful incentives to conciliate that will not be undermined if the Court adopts the Seventh Circuits' bright-line rule. When the EEOC and FEPAs achieve voluntary compliance, they are able to conserve scarce resources and end discriminatory practices and provide victim-specific relief more expeditiously and expediently, without the risks involved with litigation.

ARGUMENT

I. *Mach Mining's* Bright-Line Rule Brings Predictability Where Widely Divergent Decisions Distract the EEOC, FEPAs, District Courts, and Employers from Addressing the Merits of Agency Discrimination Claims.

The Seventh Circuit adopted a bright-line test for judicial review of conciliation in this case: "if the EEOC has pled on the face of its complaint that it has complied with all procedures required under Title VII and the relevant documents are facially sufficient, [a court's] review of those procedures is satisfied." *Mach*

Min., 738 F.3d at 184 (citing *EEOC v. Shell Oil Co.*, 466 U.S. 54, 81 (1984)). Application of this test is supported by the language of 42 U.S.C. § 2000e–5(b) and (f)(1), which grants the EEOC exclusive authority to determine whether the conciliation process produced results "acceptable to the Commission" and includes a "broad statutory prohibition on using what was said and done during the conciliation process 'as evidence in a subsequent proceeding.'" *Mach Min.*, 738 F.3d at 172-74 (quoting 42 U.S.C. § 2000e–5(b)). By deferring the success or failure of conciliation to the EEOC's judgment, and intentionally concealing even the process underpinning that judgment, the Civil Rights Act unambiguously and purposefully obscured the conciliation process from judicial examination. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-44 (1984).[4]

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[4] To escape this inevitable conclusion, Petitioner and *Amici* Retail Litigation Center, Inc. conflate the plain language of the statute with the morass of years of congressional argument. Petition for Writ of Certiorari by Petitioner-Defendant ("Petitioner's Br.") at 27-28; Brief for Petitioner as *Amicus* Curiae Retailers Association ("Retailers *Amicus* Br.") at 19-21. However, even Title VII's legislative history demonstrates that Congress wished to shield conciliation from judicial review. In passing the Equal Employment Opportunity Act of 1972, Congress rejected a house bill that only allowed the EEOC to sue if conciliation efforts failed to obtain "voluntary compliance" with the Act, which potentially allowed judicial review of employers' offers to gauge whether they were sufficient to bring them into compliance. H.R. Rep. No 92-

District courts that have nevertheless reviewed the sufficiency of EEOC conciliation efforts generally apply either the good faith standard[5] or the more searching three-part inquiry.[6] *Mach Min.*, 738 F.3d at 176. The Seventh Circuit ruled as it did, in part, because it refused to send district courts stumbling down this "dimly lighted path," to wander without a workable standard. *Id.* at 176 n.2. Judicial review under both the good faith standard and three-part inquiry has produced such unpredictable results that Fair Employment Practices Agencies ("FEPAs") and the EEOC (collectively, "Agencies") have been forced to attempt to conform to the judiciary's conciliation requirements without any clear guidance on what those

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899, at 1837 (1972). Instead, Congress granted the EEOC authority to bring suit if it did not obtain an agreement "acceptable to the Commission" itself. 42 U.S.C. § 2000e–5(f)(1).

[5] The Fourth, Sixth, and Tenth Circuits require that the EEOC's efforts meet a good faith standard. *EEOC v. Keco Indus., Inc.*, 748 F.2d 1097, 1102 (6th Cir. 1984); *EEOC v. Radiator Specialty Co.*, 610 F.2d 178, 183 (4th Cir. 1979); *EEOC v. Zia Co.*, 582 F.2d 527, 533 (10th Cir. 1978). Under this standard, the "form and substance of the EEOC's conciliation proposals are within the discretion of the EEOC and are not subject to judicial second-guessing." *Keco Indus.*, 748 F.2d at 1102.

[6] The Second, Fifth, and Eleventh Circuits evaluate conciliation under a three-part inquiry into whether the EEOC: (1) outlined to the employer its cause for believing Title VII has been violated; (2) gave the employer a chance to comply voluntarily; and (3) responded "in a reasonable and flexible manner to the reasonable attitudes of the employer." *EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1259 (11th Cir. 2003); *see also EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529, 1534 (2d Cir. 1996); *EEOC v. Klingler Elec. Corp.*, 636 F.2d 104, 107 (5th Cir. 1981).

requirements entail.[7] The "failure to conciliate" defense: (1) leads to divergent views on the sufficiency of agency conciliation as a matter of law and ad hoc notions of reasonableness that are difficult to apply more broadly; (2) holds Agencies accountable retroactively for new requirements; and (3) encourages employers to test the legal boundaries of the defense without risk.

As the Seventh Circuit observed, courts have varied widely in what actions they require of the EEOC during conciliation. *Mach Min.*, 738 F.3d at 183 n.2. For example, courts do not agree on whether the EEOC and FEPAs must identify every aggrieved person in a class before or during conciliation,[8] or whether they

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[7] Numerous district courts examining conciliation efforts without the benefit of mandatory authority on the permissible scope of judicial review conclude that there is no practical difference between the two standards. *See, e.g., EEOC v. Swissport Fueling, Inc.*, 916 F. Supp. 2d 1005, 1037 (D. Ariz. 2013) ("This Court declines to expressly adopt one approach over another because it finds that the EEOC failed to meet its pre-suit obligations under either standard."); *EEOC v. Supervalu, Inc.*, 674 F. Supp. 2d 1007, 1008 (N.D. Ill. 2009) ("My conclusion [that the EEOC satisfied conciliation attempts] would be the same under either standard.").

[8] Numerous courts have held that the EEOC can conduct presuit conciliation efforts on behalf of unidentified similarly aggrieved discrimination victims. *See, e.g., EEOC v. Harvey L. Walner & Assocs.*, 91 F.3d 963, 968 (7th Cir. 1996) (indicating that the EEOC may allege in its Complaint "unlawful conduct it has uncovered during the course of its investigation" even where that means "challeng[ing] discrimination affecting unidentified members of a known class") (citing *EEOC v. United Parcel Serv.*, 860 F.2d 372, 374 (10th Cir. 1988)); *EEOC v. PBM Graphics Inc.*, 877 F. Supp. 2d 334, 361 (M.D. N.C. 2012) ("To the extent PBM complains that

must provide a precise calculation of the amount sought in settlement.[9] Adopting either the good-faith or three-part inquiry does not improve predictability because courts have concluded, after considering both judicial review standards, that the result would be the same.[10] Resolving the split on a legal issue within a jurisdiction requires an appeal that adds years to the agency's litigation and delays resolution on the merits. While the issue remains unsettled, Agencies must continue to engage in conciliation without critical information about which standard to satisfy. Agencies cannot simply conform conciliation to the strictest of

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particular class members were not identified during the conciliation process, the EEOC is under no obligation to make such a disclosure."); *cf. EEOC v. Bass Pro Outdoor World, LLC*, 4:11-CV-3425, 2014 WL 3795579 *24 (S.D. Tex. July 30, 2014) (declining to dismiss EEOC case for not investigating on behalf of unidentified discrimination victims). Other courts have held that the EEOC must identify every claimant prior to suit. *See, e.g., Swissport Fueling*, 916 F. Supp. 2d at 1038 (concluding that the EEOC failed to provide the employer with enough notice to meaningfully participate in conciliation because it sought to conciliate on a generalized basis for unnamed class members).

[9] *Compare EEOC v. Bloomberg LP*, 751 F.Supp.2d 628, 641-42 (S.D.N.Y. 2010) (an agency must provide more than "basic information"), *with EEOC v. Riverview Animal Clinic, PC*, 761 F.Supp.2d 1296, 1302 (N.D. Ala. 2010) (agency can "negotiate in good faith even if it does not have an accurate final computation of actual damages").

[10] *See, e.g., Swissport Fueling, Inc.*, 916 F. Supp. 2d 1005 at 1037-38 (ruling that the EEOC failed to meet its pre-suit obligations under [good faith or three-part inquiry] standard where it did not provide individualized conciliation on behalf of each class member including the basis for its calculations).

the non-binding legal requirements because even pursuing that course would not necessarily save the Agencies from a failure-to-conciliate challenge, unless it resulted in a conciliation agreement. In chasing a vague conciliation ideal, the Agencies certainly will not satisfy defendants unless they forfeit their own discretion to determine the relief necessary to eliminate unlawful employment practices—accepting less recovery, considering fewer settlement options, providing relief for fewer discrimination victims—and, instead, simply accept an agreement that is acceptable to the defendants.

Having abandoned the plain language of the Act, district courts now consider the totality of the circumstances when reviewing conciliation under both the good-faith and three-part inquiry and review lengthy records. *See, e.g., EEOC v. Crye-Leike, Inc.*, 800 F. Supp. 2d 1009, 1018 (E.D. Ark. 2011) ("The Court has considered the extensive summary judgment record [of] 111 pages of briefing and 70 exhibits totaling 598 pages and finds that [Crye-Leike is] not entitled to summary judgment based on the failure of the EEOC to conciliate in good faith."). They frequently consider one or more of the following details: the amounts (or details) and timing of offers and counteroffers;[11] the contents of written conciliation

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[11] *See, e.g., Crye-Leike*, 800 F. Supp. 2d at 1014 (listing EEOC's offers and employer's counteroffers for each of the seven charging parties, including charging parties demands for attorney's fee reimbursement); *see also Riverview Animal Clinic*, 761 F. Supp. 2d at 1301-02 (considering the fact of multiple offers rather than the amounts).

communications and discussions;[12] whether the EEOC offered a face-to-face meeting;[13] the nature, type, and amount of information provided to the employer by the EEOC;[14] the calculations of back wages;[15] the basis or calculation for compensatory damages and punitive damages awards;[16] the amount of time to consider an EEOC conciliation demand;[17] what information the EEOC provided in response to an employer's request, and, if applicable, how much information was provided

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[12] *See, e.g., EEOC v. New Prime, Inc.*, 6:11-CV-03367-MDH, 2014 WL 4060305 *7, ---F. Supp. 2d --- (W.D. Mo. Aug. 14, 2014) (citing portions of written conciliation communications in decision); *EEOC v. Alia Corp.*, 842 F. Supp. 2d 1243, 1256-57 (E.D. Cal. 2012) (referring to oral communications between EEOC investigator and defendant's counsel when examining conciliation conduct).

[13] *See, e.g., EEOC v. One Bratenahl Place Condo. Ass'n*, 644 F.Supp. 218, 221 (N.D. Ohio 1986) (finding the EEOC did not conciliate in good faith where the defendant "indicated its willingness to meet and negotiate a conciliation [and] [s]uch a meeting would have provided a forum for the free exchange of ideas and proposals to hopefully reach mutually accepted remedies").

[14] *See, e.g., EEOC v. Evans Fruit Co.*, 872 F. Supp. 2d 1107, 1115 (E.D. Wash. 2012) (concluding that EEOC did not provide sufficient information).

[15] *See, e.g., Swissport Fueling, Inc.*, 916 F. Supp. 2d at 1038-39 (requiring calculations on an individual basis for every aggrieved person).

[16] *See, e.g., id.*

[17] *See, e.g., Evans Fruit Co.*, 872 F. Supp. 2d at 1115.

about the class.[18] Moreover, courts have not ranked the relative importance of the myriad of factors in their decisions, leaving the Agencies in the dark about their obligations.

Given that conciliations are informal endeavors that require consideration of a multitude of factors and competing interests to eliminate unlawful employment practices, each conciliation process is unique. It is impossible for the Agencies to predict how these factors will be applied in any specific conciliation, and their imposition denies Agencies the flexibility they need to eliminate unlawful practices. This result is contrary to Congress's express determination that EEOC has the discretion to determine whether a conciliation agreement is acceptable.

The divergent views and ad hoc reasoning of the courts that have addressed the failure-to-conciliate defense provides incentives for employers to test every conciliation process for "sub-optimal agency behavior" through judicial review. Retailers *Amicus* Br. at 15 (citing *EEOC v. Propak Logistics, Inc.*, 746 F.3d 145, 155 (4th Cir. 2014) (Wilkinson, J., concurring).[19] Without fail, employers will view the agency behavior

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[18] *See, e.g., id.* at 1114-15.

[19] Although Petitioner's *Amici* use the term, "sub-optimal" to warn against agency conduct during conciliation, the concurring opinion actually addressed a different standard. The cited opinion examined whether the EEOC should be ordered to pay an attorney's fee award to a prevailing defendant in a Title VII case based on the frivolous, unreasonable, and meritless standard that generally applies to plaintiffs. *Propak Logistics*, 746 F.3d at 155-56 (internal citations omitted).

during conciliation as "sub-optimal" if the conciliation effort proves unsuccessful, because employers invariably and necessarily believe that their settlement offers in conciliation will end unlawful employment practices and, from their perspective, only agency intransigence or overreach could justify rejection of their offers. So long as conciliation does not result in an agreement that is acceptable to the employer, therefore, employers will perceive agency behavior during conciliation as "sub-optimal." The current unsettled state of the law, in which courts have crafted divergent and often contradictory requirements for Agencies, invites disgruntled employers to put the Agencies' conciliation conduct on trial before the merits of employers' own conduct can be addressed.

Whenever a court creates a new minimum requirement for conciliation, such as that every aggrieved individual must be identified during conciliation, it retroactively holds the Agencies accountable for the new requirement and prevents legitimate discrimination claims from ever seeing the light of day. For example, in 2012, the Eighth Circuit became the first—and only—circuit to reach the conclusion that the EEOC had to conduct conciliation on behalf of each claimant. *See EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657, 696 (8th Cir. 2012) (Murphy, J., dissenting) ("Neither Title VII nor [the Eighth Circuit's] prior cases require that the EEOC conduct its presuit obligations individually "). Consequently, even absent pre-existing authority requiring individualized conciliation, the EEOC's case was subjected to partial summary judgment on behalf of the claimants who had not been identified during conciliation. Technical bars like these create an

environment where conciliation is a minefield lying before the Agencies, and employers have no reason to be persuaded by any agency's endeavor to eliminate unlawful employment practices until they get to the other side.

An employer's decision to test the limits of judicial review of conciliation carries little risk and, potentially, the greatest possible reward—dismissal of the discrimination claims. As the Seventh Circuit correctly recognized, judicial review undermines conciliation, and the "potential gains of escaping liability altogether will, in some cases, more than make up for the risks of not engaging in serious attempts at conciliation." *Mach Mining*, 738 F.3d at 179.

Amici for Petitioners contest the Seventh Circuit's rationale, stating that the negative publicity from suit gives employers "every reason to settle during conciliation—and good reason not to throw away that opportunity in the hopes of a settlement down the road, after a suit (with all of its attendant costs) has been filed." Retailers *Amicus* Br. at 13. This argument incorrectly assumes that employers universally prefer confidential settlement above other settlement considerations. On the contrary, an employer's settlement interest may also include sending a message to the employees and discouraging other claimants, possibly vindicating the employer's policies, practices, and supervisors by trial, and avoiding reinstatement or forced promotions of employees involved in the claims. 2 *Def. of Equal Emp. Claims* § 13:17 (2014), *available at* www.westlaw.com.

Amici's point that the threat of a negative EEOC press release motivates employers to settle before a

complaint also ignores the economics of settlement negotiations. Retailers *Amicus* Br. at 13.[20] Generally, "absent strategic behavior, settlement will occur whenever the minimum amount the plaintiff is willing to accept for settling the case is less than the maximum amount the defendant is willing to offer (and) the defendant's maximum 'bid' will be equal to his expectation of what he will have to pay if litigation occurs." Peter Siegelman & John J. Donohue III, *The Selection of Employment Discrimination Disputes for Litigation: Using Business Cycle Effects to Test the Priest-Klein Hypothesis*, 24 J. Leg. Stud. 427, 437-38 (1995).

Certainly, the existence of an affirmative defense for failure to conciliate would lower the maximum amount that defendants would be willing to bid, which decreases the likelihood of settlement because the Agencies' minimum offers cannot fall below the threshold necessary to eliminate unlawful employment practices. By itself, this change in the equation governing settlements during conciliation would

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[20] This point also incorrectly assumes that all press releases issued by the EEOC paint employers in a negative light. The EEOC regularly acknowledges employer's notable compliance efforts, even after a lawsuit has been filed. For example, the EEOC wrote in a recent press release announcing a consent decree that: "We are pleased with the scope of the commitment that the company has made given the breadth of the multi-state regional areas that it covers. This settlement represents a mutual recognition that well-rounded recruitment is the key to any employer's efforts to find the best candidates for the job." Press Release, EEOC, *HiLine Electric to Pay $210,000 to Settle EEOC Age Discrimination Suit* (Oct. 6, 2014), *available at* www.eeoc.gov/eeoc/newsroom/release/10-6-14c.cfm.

necessarily result in less successful conciliation, protracting and complicating Title VII litigation with "little or no offsetting benefit" in obtaining an agreement acceptable to the Commission. *See Mach Min.*, 738 F.3d at 179 (citing *Doe v. Oberweis Dairy*, 456 F.3d 704, 710 (7th Cir. 2006)).

Further, because settlement can and often does occur throughout the course of litigation, the failure to conciliate sets up a motion for summary judgment that is essentially free, allowing employers to thwart conciliation and gamble on the potential success of their defense without affecting their likelihood of success on the merits of their case.[21] Petitioner's *amici* is correct that the gamble is not entirely free. Thwarting conciliation may carry the potential for a negative press release. However, that arguable damage to reputation would only stop an employer from thwarting conciliation if it exceeded the employer's potential gain in avoiding liability altogether. This potential to gamble at the outcome creates a perverse incentive, where employers that would otherwise have the highest expectation of liability (and, presumably, the greatest chance at actually settling through conciliation) will be the most likely to tactically thwart conciliation.

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[21] Even where motion practice is constrained by consideration of attorney's fees, there is no risk of an attorney's fee award from a prevailing plaintiff when it is the government. *See, e.g.*, Ariz. Rev. Stat. § 41-1481(J) ("In any action or proceeding under this section the court may allow the prevailing party, other than the division, a reasonable attorney's fee as part of the costs.").

II. Affirming the Seventh Circuit's Bright-Line Rule and Rejecting the Implied Affirmative Defense Will Bring Predictability Without Sacrificing the Opportunity for Conciliation.

The loss of conciliation as a mechanism to end unlawful employment practices is disastrous for the Agencies, because achieving voluntary compliance through conciliation is essential to enforcement for economic and policy reasons. This is especially true for FEPAs, which have fewer attorneys, investigators, and resources than the EEOC field offices. In addition to employment, FEPAs often also enforce state and local discrimination laws in voting, housing, and public accommodations, and may be obligated to file suit in housing and public accommodations cases if conciliation fails. *See, e.g.*, Ariz. Rev. Stat. § 41-1491.34 (charging the attorney general to file a civil action when there is reasonable cause to believe a fair housing violation occurred and no conciliation agreement was obtained). Some FEPAs enforce civil rights statutes extending rights to other protected groups or covering more entities than Title VII. *See, e.g.*, Haw. Rev. Stat. § 378-2(a)(1) (extending protections based on gender identity or expression, sexual orientation, domestic or sexual violence victim status, and marital status). Voluntary compliance, when successful, frees the FEPA's personnel and resources to pursue its full range of enforcement duties. More importantly, voluntary compliance ends discriminatory practices and provides victim-specific relief more expediently and without the risks involved in litigation.

For example, the Arizona Civil Rights Division ("ACRD"), Arizona's FEPA, has its own strong

incentives to gain voluntary compliance through informal attempts to conciliate discrimination charges before and after issuing cause determinations. *See Mach Min.*, 738 F.3d at 180 (concluding that judicial review of the EEOC's conciliation undermines conciliation and is unwarranted because of the EEOC's own "powerful incentives" to conciliate). The ACRD devotes significant resources to resolving charges of discrimination through informal mediation and conciliation.

In Fiscal Year 2012, the ACRD's Compliance Section investigated 1,348 discrimination charges and resolved 901 cases, including 160 housing charges, 646 employment charges, and 95 public accommodations charges.[22] The ACRD issued 26 determinations in cases where it found reasonable cause to believe that unlawful discrimination had occurred.[23] The ACRD mediated 127 civil rights matters and facilitated 71 agreements, at a 56% settlement rate.[24] As a result of these efforts, charging parties received a total of $362,688 in monetary relief and injunctive relief. The ACRD also resolved 29 charges through pre-finding and post-finding conciliation agreements, obtaining $236,261 in monetary relief for the charging parties

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[22] See Office of Attorney General Tom Horne, Annual Report, Fiscal Year 2012 ("AGO FY 2012 Annual Report"), *available at* https://www.azag.gov/sites/default/files/sites/all/docs/annual-reports/2012AnnualReport.pdf (last visited 10/20/14) at App. B, at 16.

[23] *Id.*

[24] *Id.*

and for future monitoring and enforcement activities.[25] The conciliation agreements resulted in affirmative relief for charging parties, such as installation of accessible parking spaces, refitting for accessible restrooms, provision of American Sign Language interpretation, changes in rules, policies, or practices that interfered with the use of service animals, policy revisions, and training to prevent future civil rights violations in employment and housing.[26]

In Fiscal Year 2013, the ACRD's Compliance Section investigated 1,267 discrimination charges and resolved 827 cases, including 163 housing charges, 552 employment charges, and 112 public accommodations charges.[27] The ACRD issued 17 reasonable cause determinations.[28] The ACRD successfully conciliated 8 of these reasonable cause determinations without litigation. The ACRD mediated 113 civil rights matters and facilitated 62 agreements, at a 55% settlement rate, totaling $431,038 in monetary relief and providing injunctive relief.[29] The ACRD also resolved 19 charges through pre-finding and post-finding conciliation

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[25] *Id.* at 16-17.

[26] *Id.*

[27] See Office of Attorney General Tom Horne, Annual Report, Fiscal Year 2013 ("AGO FY 2013 Annual Report"), *available at* https://www.azag.gov/sites/default/files/sites/all/docs/annual-reports/2013AnnualReport.pdf (last visited 10/20/14) at App. C-2, at 20.

[28] *Id.*

[29] *Id.* at 21.

agreements obtaining $2[illegible]2,680 in monetary relief for the charging parties and for future monitoring and enforcement activities and non-monetary relief.[30] The affirmative relief included but was not limited to employment transfers, extended medical leave, provision of Video Remote Interpreting at mental health centers state-wide, employer training, changes to personnel files, and training and policy revisions to prevent future civil rights violations in employment and housing.[31]

When the ACRD is able to obtain voluntary compliance and conciliate past violations informally, it can more effectively accomplish its statutory responsibilities with fewer resources.

Searching judicial review and an implied, affirmative failure-to-conciliate defense inject an artifice into negotiations that obstruct meaningful conciliation. Typically, parties in settlement negotiations treat communications and offers as confidential; exchange information guided by ethical obligations, practical considerations, and strategy; and understand that they do not risk a dismissal of their claim(s) if they refuse an offer. Indeed, Congress expressed the same intent for conciliation: "nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned." 42 U.S.C. § 2000e–5(b).

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[30] *Id.* at 22-22.

[31] *Id.*

In contrast, under a case-by-case judicial review, everything said or done during conciliation may be cited in a dispositive motion or, if the dispositive motion is denied, presented to the jury. *Amici* Equal Employment Advisory Council ("EEAC") allege that the EEOC's conciliation abuses include "refusing to acknowledge obvious flaws," or discuss the "strengths and weaknesses of a claim or defense." (at 14.) But conciliation is an opportunity for voluntary compliance, not an invitation for employers to demand reconsideration of an Agency's merits findings. The EEAC's position is unrealistic because candid conciliation discussions will be curtailed if the judiciary is permitted to second-guess the EEOC's (and FEPAs') conciliation efforts.

Searching judicial review coupled with the remedy of dismissal incentivizes employers to ask the Agencies for more information, regardless of how much information has been provided, and to not undertake (or share) their own investigation into the reasonable cause determination's findings and conclusion. Indeed, employers possess significant information about wages, frequency and types of raises awarded, amounts of overtime available, availability of benefits, monetary value of its benefits, and employment trends in the industry. Yet the incentive to demonstrate sub-optimal agency behavior in conciliation allows the employer to subsequently argue that it did not receive sufficient information from the Agencies to respond to the conciliation proposal, then seek dismissal of the agency's claims for failure to meet pre-suit obligations.

CONCLUSION

This Court should affirm the Seventh Circuit's decision in *EEOC v. Mach Min., LLC*, 738 F.3d 171, 184 (7th Cir. 2013).

Respectfully submitted,

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AMICUS CURIAE BRIEF

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Supreme Court of the United States

MACH MINING, LLC,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND SOCIETY FOR HUMAN RESOURCE MANAGEMENT IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE *AMICI CURIAE*	2
SUMMARY OF ARGUMENT	3
ARGUMENT	6
I. JUDICIAL REVIEW OF EEOC CONCILIATION IS CRITICAL TO THE PROPER ADMINISTRATION OF TITLE VII	6
A. Conciliation Is At The Core Of Title VII Enforcement	7
B. If Carried Out At All, The EEOC's Conciliation Efforts Often Involve Abusive And Unreasonable Tactics That Undermine, Rather Than Promote, Informal Resolution Of Discrimination Claims	9
II. THE EEOC'S INCREASINGLY AGGRESSIVE LITIGATION PHILOSOPHY REINFORCES THE NEED FOR CAREFUL JUDICIAL OVERSIGHT OF ITS PRESUIT CONCILIATION OBLIGATIONS	11
A. As Systemic Enforcement Efforts Have Increased, So Too Have Documented Instances Of EEOC Conciliation Abuses	12

TABLE OF CONTENTS—Continued

Page

B. The Certainty Of Judicial Review Will Help Curb The Many EEOC Conciliation Abuses That Go Unreported 14

C. Employers Have No Interest In Litigating For The Sake Of Litigating 19

III. AN APPROPRIATELY ROBUST STANDARD OF REVIEW MUST ENSURE THAT EEOC CONCILIATION EFFORTS BOTH ARE MEANINGFUL AND UNDERTAKEN IN GOOD FAITH. 23

CONCLUSION 26

TABLE OF AUTHORITIES

FEDERAL CASES Page(s)

EEOC v. Agro Distribution, LLC, 555 F.3d 462 (5th Cir. 2009) 5, 10

EEOC v. Allegheny Airlines, 436 F. Supp. 1300 (W.D. Pa. 1977) 8, 25

EEOC v. Asplundh Tree Expert Co., 340 F.3d 1256 (11th Cir. 2003) 5, 9, 11

EEOC v. Associated Dry Goods Corp., 449 U.S. 590 (1981) 16

EEOC v. Bloomberg L.P., 967 F Supp. 2d 802 (S.D.N.Y. 2013) 11, 12

EEOC v. CRST Van Expedited, Inc., 679 F.3d 657 (8th Cir. 2012) 5, 10

EEOC v. CRST Van Expedited, Inc., 2009 WL 2524402 (N.D. Iowa Aug. 13, 2009) ... 11, 18

EEOC v. E.I. DuPont de Nemours & Co., 373 F. Supp. 1321 (D. Del. 1974), *aff'd*, 516 F.2d 1297 (3d Cir. 1975) 22

EEOC v. First Midwest Bank, N.A., 14 F. Supp. 2d 1028 (N.D. Ill. 1998) 15

EEOC v. Keco Industries, Inc., 748 F.2d 1097 (6th Cir. 1984) 23

EEOC v. Klingler Electric Co., 636 F.2d 104 (5th Cir. 1981) 5, 23

EEOC v. Liberty Trucking Co., 695 F.2d 1038 (7th Cir. 1982) 9

EEOC v. Ruby Tuesday, Inc., 919 F. Supp. 2d 587 (W.D. Pa. 2013) 12, 13

TABLE OF AUTHORITIES—Continued

Page(s)

EEOC v. Shell Oil Co., 466 U.S. 54 (1984).. 7

EEOC v. Swissport Fueling, Inc., 916 F. Supp. 2d 1005 (D. Ariz. 2013)..... 13

EEOC v. Zia Co., 582 F.2d 527 (10th Cir. 1978)..... 4

Occidental Life Insurance Co. v. EEOC, 432 U.S. 355 (1977)..... 8, 9, 22

W.R. Grace & Co. v. Local Union 759, 461 U.S. 757 (1983)..... 8

FEDERAL STATUTES

Title VII of the Civil Rights Act of 1964,

42 U.S.C. §§ 2000e *et seq.* .....*passim*

42 U.S.C. § 2000e-2(a)(1)..... 3, 7

42 U.S.C. § 2000e-5(b) 7, 16, 17, 18

42 U.S.C. § 2000e-5(f)(1)..... 4

LEGISLATIVE HISTORY

118 Cong. Rec. H1861 (Mar. 8, 1972)..... 9

Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972)... 8

OTHER AUTHORITIES

Drafting of a New Strategic Enforcement Plan to the Strategic Enforcement Plan Work Group, Public Input into the Development of EEOC's Strategic Enforcement Plan, Meeting of July 18, 2012 ..... 21, 22

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BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND SOCIETY FOR HUMAN RESOURCE MANAGEMENT IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council and Society for Human Resource Management respectfully submit this brief *amici curiae* in support of the position of Petitioner before this Court in favor of reversal.[1]

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes over 250 major U.S. corporations. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

Founded in 1948, the Society for Human Resource Management (SHRM) is the world's largest HR membership organization devoted to human resource management. Representing more than 275,000 members in over 160 countries, the Society is the leading provider of resources to serve the needs of HR professionals and advance the professional practice of human resource management. SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China, India and United Arab Emirates.

Many of *amici's* members are employers, or representatives of employers, subject to Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended, and other federal employment-related laws and regulations. As potential defendants

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the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

to Title VII discrimination charges and lawsuits, *amici* have a substantial interest in the question presented regarding the extent to which federal courts may review the sufficiency of the U.S. Equal Employment Opportunity Commission's (EEOC) presuit conciliation efforts. Because the EEOC is authorized to sue only after it has fulfilled its statutory duty to conciliate in good faith, judicial review of those efforts is necessary to ensure full compliance with Title VII.

As national representatives whose membership includes those primarily responsible for compliance with equal employment opportunity laws and regulations, *amici* have perspectives and experience that can help the Court assess issues of law and public policy raised in this case beyond the immediate concerns of the parties. Since 1976, EEAC and/or SHRM has participated as *amicus curiae* in hundreds of cases before this Court and the federal courts of appeals, many of which have involved Title VII questions. Because of their practical experience in these matters, *amici* are well-situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers generally.

SUMMARY OF ARGUMENT

The U.S. Equal Employment Opportunity Commission (EEOC) was created by Congress to enforce Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended, which prohibits discrimination in the terms, conditions or privileges of employment on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a)(1). Title VII authorizes the EEOC to bring a civil lawsuit against private employers in its own name, both on behalf of alleged victims and in the public

interest, but only after meaningful efforts "to secure from the respondent a conciliation agreement acceptable to the Commission" have failed. 42 U.S.C. § 2000e-5(f)(1).

Conciliation plays a critical role in carrying out the policies underlying Title VII. Indeed, "Title VII places primary emphasis on conciliation to resolve disputes." *EEOC v. Zia Co.*, 582 F.2d 527, 529 (10th Cir. 1978). Thus, in order to effectuate the meaning and legislative intent of Title VII, the EEOC must be required to conciliate every discrimination charge it believes to have merit in good faith. As virtually every court of appeals, save for the Seventh Circuit below, has held, judicial review of the EEOC's presuit conciliation efforts is necessary to ensure that Title VII's purposes and aims are achieved.

Ignoring those principles, the Seventh Circuit held that Title VII does not authorize, and in fact categorically precludes, judicial review of EEOC conciliation efforts. The Seventh Circuit's interpretation cannot be reconciled with Title VII's goals, including the resolution of workplace discrimination claims through informal, non-coercive means, and therefore should be reversed.

Precluding meaningful judicial review of EEOC presuit conciliation activities would frustrate sound employment relations policies and proactive compliance programs by encouraging, rather than minimizing, protracted Title VII litigation. Moreover, the EEOC's administrative enforcement policies and much-maligned litigation conduct over the last several years belie the agency's assurances that judicial review is unnecessary to ensure its compliance with Title VII.

For instance, the EEOC's current Strategic Plan[2] requires field offices to progressively increase the percentage of systemic cases on their active litigation dockets. Such policies serve not to encourage informal, presuit resolution of meritorious claims, but rather to incentivize staff to bypass conciliation in favor of high-profile, systemic litigation. Recent cases in which the EEOC's conciliation efforts have been roundly criticized by the courts, as well as many charge respondents' anecdotal accounts of wildly inappropriate EEOC conciliation conduct, confirm that the agency either is ill-equipped or simply not inclined to adequately police its own compliance with its presuit obligations.

Courts thus can and should evaluate and decide whether, for instance, the EEOC's denial of a defendant's request to meet face-to-face[3], failure to identify those on whose behalf it is seeking to conciliate[4], or refusal to outline the legal basis for its settlement demand[5], amounts to a lack of good faith. Judicial review is the only reliable means of ensuring that the EEOC makes every good faith effort to resolve all meritorious discrimination charges informally through non-coercive means, litigating only as a last resort.

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[2] *See, infra* note 10.

[3] *EEOC v. Agro Distrib., LLC*, 555 F.3d 462 (5th Cir. 2009).

[4] *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657 (8th Cir. 2012).

[5] *EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256 (11th Cir. 2003); *EEOC v. Klingler Elec. Corp.*, 636 F.2d 104 (5th Cir. 1981).

ARGUMENT

I. JUDICIAL REVIEW OF EEOC CONCILIATION IS CRITICAL TO THE PROPER ADMINISTRATION OF TITLE VII

In the four decades since the U.S. Equal Employment Opportunity Commission (EEOC) was given authority to litigate Title VII cases, no court – until the Seventh Circuit below – ever held that the sufficiency of the agency's statutory conciliation efforts was beyond the scope of judicial review. In fact, every court of appeals to have considered the issue not only has held that EEOC conciliation is reviewable, but also that the agency's efforts should be evaluated under a good faith standard. Until recently, even the EEOC itself routinely acknowledged and accepted the "judiciary's role in reviewing the conciliation process." Plaintiff EEOC's Response to Defendant United Road Towing's Motion for Partial Summary Judgment at 5, *EEOC v. United Road Towing, Inc.*, No. 1:10-cv-06259 (N.D. Ill. Nov. 15, 2011).

Upending that long case tradition, the Seventh Circuit below held that Title VII does not authorize, and in fact precludes, any level of judicial review of the EEOC's presuit conciliation efforts. The dubious notion endorsed by the court below that the EEOC's conciliation efforts – no matter how questionable – cannot be second-guessed by even this Court will only encourage agency behavior seemingly designed to undermine, rather than facilitate, informal resolution of discrimination charges – a result squarely at odds with Title VII's goals and purposes. Accordingly, the decision below is erroneous and should be reversed by this Court.

A. Conciliation Is At The Core Of Title VII Enforcement

The EEOC was established by, and is authorized to enforce, Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, which prohibits discrimination against a covered individual "with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Title VII sets forth "'an integrated, multistep enforcement procedure' that ... begins with the filing of a charge with the EEOC alleging that a given employer has engaged in an unlawful employment practice." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 62 (1984) (quoting *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 359 (1977) (footnote omitted)). Upon the filing of a charge, Title VII provides in relevant part:

> [T]he Commission shall serve a notice of the charge ... within ten days, and shall make an investigation thereof. ... If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge .... If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.

42 U.S.C. § 2000e-5(b).

When first enacted, Title VII gave the EEOC limited authority to prevent and correct discrimination through this administrative framework of charge

investigations and informal conciliation. In 1972, Congress amended Title VII to authorize the EEOC to bring a civil lawsuit against private employers in its own name, both on behalf of alleged victims and in the public interest. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972). "Although the 1972 amendments provided the EEOC with the additional enforcement power of instituting civil actions in federal courts, Congress preserved the EEOC's administrative functions in § 706 of the amended Act." *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 368 (1977) (quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974)). Thus, even in granting EEOC the authority to litigate, Congress retained the statute's requirement that the agency discharge all of its administrative duties, including conciliation, as a precondition to suit. *Id.*

"Conciliation is the culmination of the mandatory administrative procedures, whose purpose is to achieve voluntary compliance with the law. Each step in the process – investigation, determination, conciliation, and if necessary, suit – is intimately related to the others." *EEOC v. Allegheny Airlines*, 436 F. Supp. 1300, 1306 (W.D. Pa. 1977).

EEOC conciliation thus plays a prominent role in effectuating Title VII's ultimate goal of voluntary compliance. *See Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 368 (1977) (the EEOC "whenever possible" must attempt to resolve discrimination charges "before suit is brought in a federal court ...."); *see also W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 770-71 (1983) (voluntary compliance is an "important public policy" intended by Congress to be "preferred means of enforcing Title VII") (citation omitted). The legislative history of the 1972 amendments to Title VII

confirms Congress's preference for conciliation as a means of resolving discrimination claims:

> The conferees contemplate that the Commission will continue to make every effort to conciliate as required by existing law. Only if conciliation proves to be *impossible* do we expect the Commission to bring action in federal district court to seek enforcement.

118 Cong. Rec. H1861 (Mar. 8, 1972) (quoted by *EEOC v. Zia*, 582 F.2d 527, 533 (10th Cir. 1978)) (emphasis added).

In fact, presuit conciliation is so crucial to the administration of Title VII that this Court has directed the EEOC to "refrain from commencing a civil action until it has discharged its administrative duties." *Occidental*, 432 U.S. at 368; *see also EEOC v. Liberty Trucking Co.*, 695 F.2d 1038, 1042-43 (7th Cir. 1982) (conciliation is "so important to the statutory scheme that the EEOC may not commence legal action until it has attempted to negotiate voluntary compliance"); *EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1260 (11th Cir. 2003) (duty to conciliate is "at the heart of Title VII").

B. If Carried Out At All, The EEOC's Conciliation Efforts Often Involve Abusive And Unreasonable Tactics That Undermine, Rather Than Promote, Informal Resolution Of Discrimination Claims

Despite the critical role of conciliation in Title VII's overall enforcement scheme, the EEOC repeatedly has circumvented the process by persistently refusing to engage in meaningful efforts to conciliate prior to suit.

In particular, the agency now regularly employs heavy-handed, hide-the-ball negotiation tactics during conciliation, often to coerce employers to settle, particularly those that justifiably fear the reputational damage that would result from an EEOC-initiated public enforcement action. *See, e.g., EEOC v. Agro Distrib., LLC*, 555 F.3d 462, 468 (5th Cir. 2009) (EEOC "compounded its arbitrary assessment that Agro violated the ADA with an unsupportable demand for compensatory damages as a weapon to force settlement").

Sometimes, the EEOC fails to conduct *any* manner of conciliation prior to filing suit. In *EEOC v. CRST Van Expedited, Inc.*, for instance, the EEOC sued a nationwide trucking company, alleging that it subjected a class of female drivers to unlawful sexual harassment in violation of Title VII.[6] 679 F.3d 657 (8th Cir. 2012). The EEOC sought a range of remedies, including non-monetary injunctive and programmatic relief, as well as back pay, compensatory and punitive damages on behalf of a single charging party and a class of approximately 270 current and former employees. *Id.*

The EEOC's class eventually was whittled down to 67 alleged victims. In dismissing those remaining claims, the trial court observed that "the EEOC's failure to investigate the claims of the 67 allegedly aggrieved persons deprived CRST of a meaningful opportunity to engage in conciliation and foreclosed any possibility that the parties might settle all or some

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[6] The EEOC's complaint, which was signed by EEOC Regional Attorney John Hendrickson, stemmed from a single sexual harassment charge of discrimination it received from former employee Monika Starke. *CRST*, 679 F.3d at 668.

of this dispute without the expense of a federal lawsuit." *EEOC v. CRST Van Expedited, Inc.*, 2009 WL 2524402, at *18 (N.D. Iowa Aug. 13, 2009); *see also EEOC v. Bloomberg L.P.*, 967 F. Supp. 2d 802, 816 (S.D.N.Y. 2013) (sanction of dismissal necessary so as not to "sanction[] a course of action that promotes litigation in contravention of Title VII's emphasis on voluntary proceedings and informal conciliation"); *EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1261 (11th Cir. 2003) ("In its haste to file the instant lawsuit, with lurid, perhaps newsworthy, allegations, the EEOC failed to fulfill its statutory duty to act in good faith to achieve conciliation, effect voluntary compliance, and to reserve judicial action as a last resort") (footnote omitted).

The decision below serves only to encourage the agency's use of such tactics, knowing that even its most egregious conciliation conduct will never see the light of day. If for no other reason, careful judicial review of the EEOC's conciliation activities is necessary to guard against this abuse of process, which harms employers and charging parties alike, and undermines the very core of Title VII's enforcement scheme.

II. THE EEOC'S INCREASINGLY AGGRESSIVE LITIGATION PHILOSOPHY REINFORCES THE NEED FOR CAREFUL JUDICIAL OVERSIGHT OF ITS PRESUIT CONCILIATION OBLIGATIONS

In recent years, the EEOC has put a high priority on pursuing systemic litigation where alleged discrimination has a potentially broad impact on an industry, profession, company or geographic area. In fact, the agency has established goals requiring its field offices

to ensure that a specific percentage of lawsuits brought by the EEOC is systemic in nature. *See infra* note 10.

Implicit in the EEOC's aggressive enforcement strategy is the general assumption that conciliation is merely a means to an end – not to resolve suspected discrimination informally in a just and meaningful way, but rather to extort an exorbitant monetary settlement from a charge respondent under constant threat of high-profile litigation. The EEOC stands to benefit greatly from such an approach in a number of ways, including by enabling the agency to submit impressive reports to Congress touting its success in recovering millions of dollars on behalf of countless discrimination victims.[7]

A. As Systemic Enforcement Efforts Have Increased, So Too Have Documented Instances Of EEOC Conciliation Abuses

Concomitant with the increase in EEOC-initiated systemic cases has been an increase in court cases finding that the agency failed to meet its conciliation obligation as required by Title VII. *See, e.g., EEOC v. Bloomberg, LP*, 967 F. Supp. 2d 802 (S.D.N.Y. 2013); *EEOC v. Ruby Tuesday, Inc.*, 919 F. Supp. 2d 587

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[7] *See* EEOC Press Release, *EEOC Releases Performance and Accountability Report Under New Strategic Plan* (Nov. 19, 2012) (in which the EEOC touts its "historic monetary recovery through is [sic] private sector administrative enforcement – $365.4 million – the highest level of monetary relief ever. Administrative enforcement includes mediation, settlements, withdrawals with benefits and conciliation. Approximately 10 percent of this amount – $36 million – came from investigations and conciliations of systemic charges of discrimination, four times the amount received in the previous fiscal year"), *available at* http:// www.eeoc.gov/eeoc/newsroom/release/11-19-12.cfm

(W.D. Pa. 2013); *EEOC v. Swissport Fueling, Inc.*, 916 F. Supp. 2d 1005 (D. Ariz. 2013). Indeed, the EEOC has developed quite a "reputation for testing the boundaries of the law" in that regard. Editorial, *Discriminating Against Partnerships: The feds try to rewrite PwC's retirement policy*, Wall St. J. (June 3, 2013).[8] The agency's conciliation tactics have been so questionable of late that they have garnered particularly unflattering media coverage.

For example, a June 3, 2013 *Wall Street Journal* editorial described the futile efforts of one company, PricewaterhouseCoopers (PwC), to obtain meaningful information from the EEOC regarding the basis for its reasonable cause determination and conciliation demand. The EEOC reportedly "declined to explain and merely read [this Court's] *Clackamas* tests [sic] out loud, hoping the company would settle." *Id.*

Lawyers for the company questioned whether the EEOC's conciliation efforts were sufficient to satisfy its statutory obligations, and explained that the agency's recalcitrance "deprived us of the ability to formulate a proposal to address your concerns." *Id.* The company nevertheless offered to formally reconsider the challenged mandatory retirement policy, but two days later, the EEOC ended negotiations. *Id.* The editorial blasted the EEOC, calling the PwC case "one more example of the ways that [the EEOC] harasses private business simply because it wants to show who's the boss." *Id.*

The EEOC's corresponding shift in philosophy – that Title VII's plain text and legislative history confirm that Congress did not intend for the agency's

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[8] *Available at* http://online.wsj.com/article/SB10001424127887323855804578511693604180764.html

conciliation efforts to be subject to judicial review – is a less-than-subtle attempt on the agency's part to avoid the predictably negative consequences for failing to comply with its statutory conciliation mandate.

B. The Certainty Of Judicial Review Will Help Curb The Many EEOC Conciliation Abuses That Go Unreported

The EEOC regularly employs many of the same abusive conciliation tactics during the administrative investigations process, outside of the purview of the courts or the news media, cautioning further in favor of judicial review of the agency's conciliation practices.

Amici have been told that EEOC investigators regularly refuse to explain the rationale for a reasonable cause determination or discuss the strengths and weaknesses of a claim or defense, contending that the merits are irrelevant during conciliation. Even when agency officials have been willing to discuss the basis for their findings and demand for relief during conciliation, they often refuse to acknowledge obvious flaws in the agency's legal theory, or provide confusing and contradictory explanations for their actions.

For example, one employer reported receiving a cause determination from a state fair employment practices agency in a matter that had been dual-filed with the EEOC. After the state's settlement efforts failed, the matter was sent to the EEOC for its review. The EEOC did not close the case or launch its own investigation. Instead, the agency held on to the case and, *six years later*, issued its own reasonable cause determination. During the conciliation that followed, it insisted that the employer was responsible for lost wages for the entire period during which the charge

was pending, claiming the agency's unexplained delay in pursing the matter was "irrelevant" to the calculation of damages.

Amici also have been told repeatedly that the EEOC regularly refuses to provide any information during conciliation to support very large monetary demands, often on behalf of purported "classes" of victims never identified in the underlying charge. Particularly in systemic or class-based cases, *amici* understand that the EEOC often refuses to describe how back pay was calculated or provide other basic information supporting the class-based conciliation demand.

Worse still, *amici's* members report that EEOC conciliation too often consists of "take it or leave it" demands and, even in the case of an acquiescing employer, the agency's outright refusal to offer any meaningful guidance or assistance on how best to comply. *Amici* are aware anecdotally that the EEOC has demanded that an employer change its hiring policies and practices, while at the same time refusing repeated requests to identify or suggest specific changes that would satisfy the demand on the ground that it is not the agency's "job" to educate employers on how to follow the law.

Employers should not be required to make a "conciliation proposal in an evidentiary vacuum." *EEOC v. First Midwest Bank, N.A.*, 14 F. Supp. 2d 1028, 1032 (N.D. Ill. 1998). When the EEOC makes a conciliation demand that is tantamount to a request for a blank check, and then abruptly ends negotiations when the employer questions the legal and factual basis for its position, it cannot be said to have discharged its statutory presuit obligations. Nor should the courts simply accept the agency's word on the matter.

The EEOC frequently demands during conciliation negotiations that the employer agree to allow the agency to publically disclose the terms of any agreement, including the amount of monetary relief the employer has agreed to pay to resolve the matter. While it often seeks to bypass Title VII's conciliation confidentiality provisions when doing so would serve its own best interests, the EEOC also has been known to withhold information from respondents during conciliation on confidentiality grounds. Pointing to Title VII's confidentiality clause, 42 U.S.C. § 2000e-5(b), for instance, the EEOC in one case reportedly refused to provide the employer with copies of an expert report on which it had relied in determining reasonable cause and formulating its conciliation demand. And yet this Court long ago confirmed that "the 'public' to whom the statute forbids disclosure ... cannot logically include the parties to the agency proceeding." *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 598 (1981) (footnote omitted).[9]

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[9] It thus appears that the EEOC regularly invokes, or disregards, § 2000e-5(b)'s confidentiality clause specifically as a negotiation tactic. This, too, is troubling, and should be subject to review by the courts. According to the EEOC, "Congress provided that nothing said or done during the conciliation *process* may be 'used as evidence in a subsequent proceeding without the written consent of the persons concerned.'" Brief of the Respondent at 3 (emphasis added). The agency's interpretation mischaracterizes the actual scope and meaning of § 2000e-5(b), which provides, in relevant part:

> The Commission *shall endeavor to eliminate any such alleged unlawful employment practice* by informal means of conference, conciliation, and persuasion. Nothing said or done during and as a part of *such informal endeavors* may be made public *by the Commission, its officers or employees,*

Employers also have described instances in which the EEOC either has refused requests for face-to-face conciliation conferences altogether, or has placed unreasonable conditions on such meetings. In one case, the EEOC reportedly refused to meet with the employer unless it agreed not to revisit or question the merits of the underlying case. In another, the EEOC refused to meet in-person with an employer unless and until it provided a point-by-point response to the EEOC's conciliation proposal, which consisted of a large monetary demand and extensive, nonmonetary programmatic relief. The company explained that in order to fully understand and properly respond to the EEOC's conciliation demand, it needed to have a more detailed discussion with the agency regarding the basis of the investigation findings and relief sought. The EEOC persisted, and the company accordingly supplied a partial response to the demand based on the limited information it had, again requesting a face-to-face meeting.

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or used as evidence in a subsequent proceeding *without the written consent of the persons concerned*.

42 U.S.C. § 2000e-5(b) (emphasis added).

On its face, § 2000e-5(b)'s confidentiality provision restricts the Commission's ability to disclose that which is said or done as part of the agency's efforts "to eliminate any such alleged unlawful employment practice" in subsequent litigation. *Id.* In other words, it prohibits the EEOC from disclosing the content or nature of substantive discussions, and in particular those related to possible remedies for suspected discrimination, that occur during or in connection with conciliation.

Even assuming the EEOC's construction of § 2000e-5(b) is plausible, the agency still glosses over the fact that it is bound only to the extent that the "persons concerned" have not consented to the disclosure. *Id.*

Within hours, however, the company received a letter from the EEOC deeming conciliation to have failed, and three days after that, the agency filed suit. It is inconceivable that when Congress first instructed the agency to "endeavor to eliminate" discrimination through non-coercive conciliation, 42 U.S.C. § 2000e-5(b), it would have had such tactics in mind.

It goes without saying that a company has a fiduciary responsibility to act in the best interest of its shareholders and cannot simply agree to compensate an undetermined number of unidentified individuals – and for violations it knows nothing about and cannot verify. Before a company can justify entering into any settlement, it must have some way to "value" the case, which would require at a minimum a clear understanding of the agency's findings, the size and scope of the effected class, and whether the alleged victims attempted to mitigate their damages and by how much.

The EEOC's persistent refusal to provide any meaningful information with which to evaluate an employer's potential liability undermines the conciliation process, and it is clearly within the scope of a federal court's authority to so find. Accepting the EEOC's bald assertion that Title VII precludes judicial review of its presuit conciliation efforts would defeat the important public policy objectives inherent in Congress' stated preference for the informal resolution of Title VII charges and would "expand the power of the EEOC far beyond what Congress intended ...." *EEOC v. CRST Van Expedited, Inc.*, 2009 WL 2524402, at *17 (N.D. Iowa Aug. 13, 2009).

Under the EEOC's current enforcement philosophy, employers have little confidence that discrimination claims will be evaluated by the EEOC fairly and in a

consistent manner, or that the agency will pursue suit *only* in those rare instances in which informal resolution is not possible. Indeed, the agency's current policy and strategic enforcement priorities appear increasingly at odds with its presuit conciliation mandate.[10] To the extent that the decision below further emboldens the EEOC to pursue what has been characterized as a "sue first, ask questions later" strategy, it betrays the core goals and principles underlying Title VII and therefore must be reversed.

C. Employers Have No Interest In Litigating For The Sake Of Litigating

The EEOC asserts that employers have "every incentive to thwart the settlement process and to 'stockpile exhibits for the coming court battle' rather than to negotiate in good faith with the Commission ...." Brief for the Respondent at 11. That notion cannot be further from the truth, especially in the case of large, public companies that answer and are accountable to boards of directors and shareholders. Businesses generally seek to avoid litigation to the maximum extent possible, not only because of the toll particularly high-profile cases can have on employee

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[10] As noted, the EEOC's current Strategic Enforcement Plan calls on the agency to progressively increase the percentage of systemic cases on its active litigation docket. EEOC, Strategic Enforcement Plan FY 2013-2016, *available at* http://www.eeoc.gov/eeoc/plan/sep.cfm. Accordingly, the EEOC last fiscal year established an 18%-21% target based on the percentage of systemic cases on its litigation docket by the end of the year. EEOC, Fiscal Year 2013 Performance and Accountability Report (Systemic Cases – Performance Measure 4), *available at* http://www.eeoc.gov/eeoc/plan/2013par.cfm. The agency exceeded that target in Fiscal Year 2013, with 54 of the 231 active cases on its litigation docket raising systemic issues. *Id.*

morale and consumer confidence, but also because of the significant costs and uncertainty associated with defending such matters.

The EEOC's persistent refusal to explain the basis for substantial (in some cases, multi-million dollar) monetary conciliation demands makes it all but certain that the respondent's representative will be unable to obtain the settlement authority from company executives needed to resolve the case. One employer characterizes the problem as follows:

> The company has received an eight-figure conciliation demand from the EEOC. Its in-house counsel escalates the matter to the company's CFO and President, who ask for detailed information regarding the basis for and evidence supporting the demand, as well as how it was calculated, and who and what it covers. In addition, they ask for a reasonable valuation of the case, including how much it would cost to litigate, and a recommendation on how to respond to the EEOC. The executives also want to know the scope of the problem so as to begin immediately to fix it.
>
> The EEOC has provided the company with only minimal information regarding the basis for its class-based findings and demand for class-based relief, and refuses to identify even the size of the alleged victim class. Accordingly, counsel cannot place a value on the case, or respond meaningfully to any of the executives' questions, and is denied the authority needed to settle the charge on the EEOC's terms – which the agency has made clear are non-negotiable.

In fact, it is the EEOC – the litigation efforts of which are funded by taxpayer dollars – that has the strongest interest in bypassing confidential, out-of-court settlement in favor of high-profile litigation. In written testimony submitted to the Commission in connection with the development of its Strategic Enforcement Plan, for instance, John Hendrickson, Regional Attorney of the EEOC's Chicago District Office and Counsel of Record in the underlying case, expressed his view that:

> [A]ny Strategic Enforcement Plan, in addition to recognizing bifurcation and delegated litigation authority, should state that *litigation itself is the bedrock of agency enforcement*. If there is no expectation of litigation in the wake of discrimination, then discrimination shall surely flourish. More than that, there must be an expectation of systemic litigation which is effective.

Drafting of a New Strategic Enforcement Plan by the Strategic Enforcement Plan Work Group, Public Input into the Development of EEOC's Strategic Enforcement Plan, Meeting of July 18, 2012 (written testimony of John Hendrickson, Chicago District Office) (emphasis added).[11]

Mr. Hendrickson continued:

> *Administrative investigations and EEOC litigation* under the 2012 Strategic Plan and its implementing Strategic Enforcement Plan are virtually certain to involve higher stakes, stakes of a different order of magnitude, including both dollars for distribution to class members and

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[11] *Available at* http://www.eeoc.gov/eeoc/meetings/7-18-12/hendrickson.cfm

> reforms in how business is conducted and human capital is managed [sic] compelled as matters of injunctive relief. Our vision will continue to be "justice and equality in the workplace."

Id. (emphasis added).

That perspective aside, EEOC's core mission is, and always has been, to prevent and correct discriminatory employment practices by conducting proper charge investigations and by attempting to correct alleged violations through informal, non-coercive conciliation. Although the agency also is authorized to litigate strategically in the public interest, voluntary resolution of discrimination claims remains "'the preferred means for achieving' the goal of equality of employment opportunities." *Occidental*, 432 U.S. at 368 (citation omitted).

Despite the critical role that conciliation plays in the Title VII's administrative enforcement scheme, the EEOC's most experienced and powerful litigator in testimony regarding *strategic enforcement* tellingly fails to make even passing reference to it. To the contrary, he believes that litigation, not conciliation or other forms of dispute resolution, is "the bedrock of agency enforcement" – a view that undoubtedly is shared by his direct reports and other agency litigators. Hendrickson written testimony, *supra*.

Those beliefs, coupled with the agency's overall systemic enforcement strategy, confirm that the EEOC mistakenly "views [its] power of suit and its administrative process as unrelated activities, rather than as sequential steps in a unified scheme for securing compliance with Title VII." *EEOC v. E.I. DuPont de Nemours & Co.*, 373 F. Supp. 1321, 1333 (D. Del. 1974), *aff'd*, 516 F.2d 1297 (3d Cir. 1975).

They also confirm that the EEOC is ill-equipped to properly self-police its conciliation efforts. Among other things, the Commission's broad delegation of litigation authority to the General Counsel has resulted in little managerial oversight of field enforcement activities, including the fulfillment of presuit conciliation responsibilities. In addition, the agency has never issued any detailed rules governing the conduct of conciliations, so even if it were inclined to monitor its activities for compliance, it would have no standards to apply. Finally, the incentives established in the Strategic Plan for developing robust systemic litigation dockets serve as a potent disincentive to engaging in meaningful conciliation efforts.

III. AN APPROPRIATELY ROBUST STANDARD OF REVIEW MUST ENSURE THAT EEOC CONCILIATION EFFORTS BOTH ARE MEANINGFUL AND UNDERTAKEN IN GOOD FAITH

The EEOC does not satisfy its administrative duties merely by inviting a respondent to participate in conciliation. Indeed, the EEOC's right to sue must be premised on fulfillment of its conciliation obligation "in good faith, while encouraging voluntary compliance and reserving judicial action as a *last resort*." *EEOC v. Klingler Elec. Co.*, 636 F.2d 104, 107 (5th Cir. 1981) (emphasis added). Even the most deferential standard of review concedes as much. *See, e.g., EEOC v. Keco Indus., Inc.*, 748 F.2d 1097, 1102 (6th Cir. 1984).

The EEOC argued below that presuit administrative processes, including conciliation, are entirely unreviewable, even under a standard "where the [agency] simply demonstrates that it made a proposal

and the employer rejected it ...." Petition of the Equal Employment Opportunity Commission for Interlocutory Appeal at 18, *EEOC v. Mach Mining, LLC*, No. 13-8012 (7th Cir. May 30, 2013). It explains, "This kind of review risks unnecessarily formalizing the conciliation process in contravention of the statute's admonition that conciliation be 'informal' .... Any further review, on the other hand, would require adding a standard not expressly authorized by the statute." *Id.*

The EEOC insists that "the distinction between substance and procedure in [the conciliation] context is elusive at best," Brief of the Respondent at 10, as evidenced by the "inability of courts to develop workable standards" for assessing the sufficiency of its conciliation efforts. *Id.* at 11. To the contrary, the federal courts of appeals have crafted straightforward, workable standards for assessing whether the EEOC has fulfilled its statutory conciliation obligations, standards that have been applied for as long as the EEOC has been litigating Title VII cases. The courts have done so without "engag[ing] in a prohibited inquiry into the substantive reasonableness of particular offers." *Id.* (citation omitted).

Indeed, as Petitioner aptly observes, courts applying any of the current standards of review may assess whether or not the EEOC's (1) refusal to meet face-to-face; (2) refusal to disclose any information regarding the specific victims on whose behalf it seeks to obtain relief; and/or (3) failure to provide the respondent with a reasonable period of time to consider a conciliation demand amounts to a breach of the agency's duty to conciliate in good faith – without having to examine the substantive conciliation proposals and counter-proposals. Brief for Petitioner at 25. Most require

even more. Given the many documented and anecdotal instances of unreasonable conciliation tactics by the EEOC, this Court should establish a standard of review that not only incorporates a basic, good faith component, but also is sufficiently robust so as to effectively deter such conduct. *See, e.g.*, Brief for Petitioner at 37-43.

Rather than independent, mutually exclusive functions, the EEOC's investigation and merits determination "are supposed to provide a framework for conciliation." *EEOC v. Allegheny Airlines*, 436 F Supp. 1300, 1305-06 (W.D. Pa. 1977) (emphasis added). Conciliation, in turn, represents "the culmination of the mandatory administrative procedures, whose purpose is to achieve voluntary compliance with the law" without resort to litigation. *Id.* When the agency fails to discharge its conciliation duties in good faith, it deprives the employer of a meaningful opportunity to resolve the matter informally, as contemplated by Congress in Title VII. Because of the vital role that conciliation plays in the administration of Title VII, judicial review of the EEOC's compliance with its statutory conciliation mandate is crucial.

CONCLUSION

For the foregoing reasons, the decision of the Seventh Circuit below should be reversed.

Respectfully submitted,

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MACH MINING, LLC,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF *AMICI CURIAE* IMPACT FUND, NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, AARP, ASIAN AMERICANS ADVANCING JUSTICE – ASIAN LAW CAUCUS, DISABILITY RIGHTS CALIFORNIA, AND PUBLIC COUNSEL IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. Judicial Review of Conciliation Undermines Title VII's Mandate of Confidentiality and Harms Victims of Discrimination 5

A. An Implied Affirmative Defense Is Inconsistent with Statutorily-Mandated Confidentiality 5

B. Review of EEOC Conciliation Efforts Inappropriately Exposes Judges to Settlement Discussions 8

II. Dismissal Is Never an Appropriate Remedy for Insufficient Conciliation 9

A. Dismissal Unjustly Punishes the Victims of Discrimination 11

B. District Courts Have the Authority to Allow Further Conciliation 14

CONCLUSION 15

TABLE OF AUTHORITIES

Page

CASES

Burrage v. United States, 134 S. Ct. 881 (2014).....15

EEOC v. Bloomberg L.P., 751 F. Supp. 2d 628 (S.D.N.Y. 2010), *decision clarified on reconsideration* (Dec. 2, 2010) 6

EEOC v. Bloomberg L.P., 967 F. Supp. 2d 802 (S.D.N.Y. 2013).....12

EEOC v. CRST Van Expedited, Inc., No. 07-CV-95-LRR, 2009 WL 2524402 (N.D. Iowa Aug. 13, 2009) 6

EEOC v. CRST Van Expedited, Inc., 679 F.3d 657 (8th Cir. 2012) 11, 12

EEOC v. LifeCare Mgmt. Servs., LLC, No. 02:08-CV-1358, 2009 WL 772834 (W.D. Pa. Mar. 17, 2009) 8, 9

EEOC v. Mach Mining, LLC, 738 F.3d 171 (7th Cir. 2013), *cert. granted*, 134 S. Ct. 2872 (2014).....6, 10

EEOC v. Waffle House, Inc., 534 U.S. 279 (2002)..... 13

Gen. Tel. Co. v. EEOC, 446 U.S. 318 (1980) 13

Gross v. FBL Fin. Servs., Inc., 557 U.S. 167 (2009).....10

In re Midland Nat'l Life Ins. Co. Annuity Sales Practices Litig., 686 F.3d 1115 (9th Cir. 2012).....7

Kamakana v. City & Cnty. of Honolulu, 447 F.3d 1172 (9th Cir. 2006).....7

Lewis v. City of Chicago, 560 U.S. 205 (2010) 9

TABLE OF AUTHORITIES – Continued

Page

Lugosch v. Pyramid Co. of Onondaga, 435 F.3d 110 (2d Cir. 2006) 6

Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517 (2013) 9

STATUTES

29 U.S.C. § 626(c)(1) 11

42 U.S.C. § 12117(a) 11

42 U.S.C. § 2000e-5(b) 5, 6, 8

42 U.S.C. § 2000e-5(f)(1) 14

Fed. R. Civ. P. 16(a)(5) 14

OTHER AUTHORITIES

EEOC, Enforcement and Litigation Statistics, All Statutes, FY 1992-FY 1996, http://www.eeoc.gov/eeoc/statistics/enforcement/all-a.cfm 13

EEOC, Enforcement and Litigation Statistics, All Statutes, FY 1997-FY 2013, http://www.eeoc.gov/eeoc/statistics/enforcement/all.cfm 13

INTEREST OF *AMICI CURIAE*

Amici curiae are public interest organizations representing the interests of workers, consumers, persons with disabilities, and civil rights plaintiffs, particularly those of modest means. *Amici* advocate for those who often cannot safeguard their own rights. *Amici* present here the perspective of the victims of workplace discrimination who often must depend on the Equal Employment Opportunity Commission (EEOC) to vindicate their rights.[1]

The **Impact Fund** is a nonprofit foundation that provides funding, training, and co-counsel to public interest litigators across the country. The Impact Fund has been counsel in a number of major civil rights class actions, including cases challenging employment discrimination, lack of access for those with disabilities, and violations of fair housing laws.

The **National Employment Lawyers Association (NELA)** advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. Founded in 1985, NELA is the country's largest professional organization comprised exclusively of lawyers who represent individual employees in cases involving labor, employment, and

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[1] Pursuant to Sup. Ct. R. 37.6, *Amici* state that no counsel for any Party authored this brief, in whole or in part. In addition, no person or entity, other than *Amici*, has made any monetary contribution to the preparation and submission of this brief. All Parties have consented to the filing of this brief.

civil rights disputes. NELA and its 69 state and local affiliates have more than 4,000 members nationwide committed to working for those who have been illegally mistreated in the workplace.

AARP is a nonpartisan, nonprofit organization with a membership that helps people turn their goals and dreams into real possibilities, strengthens communities, and fights for issues that matter most to families, such as employment and income security, healthcare, retirement planning, affordable utilities, and protection from financial abuse. AARP is dedicated to addressing the needs and interests of people aged fifty and older, including older workers, and strives through legal and legislative advocacy to preserve the means to enforce their rights. AARP has a long history of advocating for vigorous enforcement of employment discrimination laws at the federal and state level, including the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §§ 621-634, the Americans with Disabilities Act of 1990, as amended, 42 U.S.C. §§ 12101, *et seq.*, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e.

Asian Americans Advancing Justice – Asian Law Caucus (ALC) was founded in 1972 with a mission to promote, advance, and represent the legal and civil rights of Asian and Pacific Islanders, with a particular focus on low-income members of those communities. Advancing Justice – ALC is part of a national affiliation of Asian American civil rights groups, with offices in Los Angeles, Chicago, and Washington, DC. Advancing Justice – ALC has a long

history of protecting low-wage immigrant workers through direct legal services, impact litigation, community education, and policy work. Advancing Justice – ALC regularly assists workers with their discrimination claims in the EEOC complaint and conciliation process.

Disability Rights California, a statewide nonprofit corporation, is the State of California's designated federal protection and advocacy agency for people with disabilities, and provides abuse and neglect investigation, information and training, facility monitoring, and may pursue administrative, legal, and other appropriate remedies or approaches to ensure the protection of the rights of people with disabilities.

Public Counsel is the largest not-for-profit law firm of its kind in the nation. It is the public interest arm of the Los Angeles County and Beverly Hills Bar Associations and is also the Southern California affiliate of the Lawyers' Committee for Civil Rights Under Law. Established in 1970, Public Counsel is dedicated to advancing equal justice under law by delivering free legal and social services to indigent and underrepresented children, adults, and families throughout Los Angeles County. In 2013, Public Counsel assisted more than 30,000 people with direct legal services and assisted hundreds of thousands more through filing impact lawsuits, influencing policy, and sponsoring legislation.

SUMMARY OF ARGUMENT

Amici support the Solicitor General's position that a court may not review the sufficiency of the EEOC's pre-suit conciliation efforts. *Amici* write separately to provide the perspective of the victims of workplace discrimination whom Title VII is intended to protect. *Amici* raise arguments not addressed, or fully addressed, by the parties.

1. Any substantive review of conciliation efforts harms the victims of discrimination by violating Title VII's mandate that conciliation remain confidential. The statute's guarantee of confidentiality ensures that the EEOC, charging parties, and employers can engage in full and frank settlement negotiations with the goal of achieving voluntary compliance. Judicial review of conciliation efforts has a chilling effect on settlement because it exposes the substance of sensitive discussions to the district court and, potentially, to the public. Charging parties are doubly harmed: they are less able to resolve their claims in conciliation and, when forced to litigate, their claims are heard by judges potentially influenced by irrelevant settlement communications.

2. If this Court decides to allow some level of review of the EEOC's pre-suit conciliation efforts, dismissal should not be the remedy where those efforts are found to be inadequate. This overly-harsh consequence unfairly punishes the victims of discrimination, and is contrary to the purpose of Title VII. Instead, if an employer is genuinely interested in

further conciliation, the district court should—without delving into the substance of the negotiations—allow an additional period for settlement discussions.

ARGUMENT

I. Judicial Review of Conciliation Undermines Title VII's Mandate of Confidentiality and Harms Victims of Discrimination.

A. An Implied Affirmative Defense Is Inconsistent with Statutorily-Mandated Confidentiality.

Title VII provides that conciliation efforts are to remain confidential, and criminalizes disclosure of such efforts without consent. 42 U.S.C. § 2000e-5(b). Allowing courts to review the sufficiency of the EEOC's conciliation efforts directly undermines this express mandate.

If judicial review is allowed, the parties will necessarily have to disclose confidential settlement communications. The district court must then parse the give-and-take between the EEOC and the employer, as well as the details of offers and counter-offers. As the Seventh Circuit appropriately observed, "[a] court reviewing whether the agency negotiated in good faith would almost inevitably find itself engaged in a prohibited inquiry into the substantive reasonableness of particular offers—not to mention using confidential and inadmissible materials as evidence—unless its review were so cursory as to be

meaningless." *EEOC v. Mach Mining, LLC*, 738 F.3d 171, 177 (7th Cir. 2013), *cert. granted*, 134 S. Ct. 2872 (2014).

Despite paying homage to the "modest" role of the court in reviewing the EEOC's conciliation efforts, some district courts have delved deeply into the particulars. In *EEOC v. Bloomberg L.P.*, the court reviewed the details of correspondence between the EEOC and the employer, the offers and counter-offers made by each side, and what took place during certain conciliation meetings. 751 F. Supp. 2d 628, 637-42 (S.D.N.Y. 2010), *decision clarified on reconsideration* (Dec. 2, 2010). Likewise, in *EEOC v. CRST Van Expedited, Inc.*, the district court referenced specific emails, voicemails, and conversations between the EEOC and defense counsel. No. 07-CV-95-LRR, 2009 WL 2524402, at *6-7 (N.D. Iowa Aug. 13, 2009).

This is not what Congress intended. Under Title VII, conciliation efforts are confidential and are to remain confidential. The severe penalties for breach demonstrate that this admonition is not merely a suggestion: violation is punishable by a fine of up to $1,000, imprisonment for up to a year, or both. 42 U.S.C. § 2000e-5(b).

Filing conciliation evidence under seal (or redacted) will not solve the problem. Even if the parties agree that certain evidence should be sealed, the district court might not acquiesce. Nor is there any guarantee that dockets will remain sealed, particularly if the media seeks access. *See, e.g., Lugosch v.*

Pyramid Co. of Onondaga, 435 F.3d 110, 126-27 (2d Cir. 2006) (holding that a presumption of immediate public access attached to certain sealed documents and ordering the district court to quickly ensure immediate access to the documents if appropriate). As one circuit court explained, "we embrace the judge's decision to carefully review every document in light of the somewhat tepid and general justifications offered for sealing the documents," noting that the district court had reserved the right to unseal the materials if it "'determine[d] that they should be available to the public or otherwise do not merit sealed status.'" *Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1186-87 (9th Cir. 2006) (quoting district court decision); *see also, e.g., In re Midland Nat'l Life Ins. Co. Annuity Sales Practices Litig.*, 686 F.3d 1115, 1120 (9th Cir. 2012) ("Because there are no compelling reasons to keep the judicial records sealed, we order the district court on remand to grant the motion to unseal."). Collateral litigation about sealing and unsealing conciliation records will cause delay and divert the court's attention from the merits.

This Court should also reject Mach Mining's claim that the employer or the EEOC can waive the charging party's right to confidentiality by "put[ting] conciliation at issue." *See* Pet. Br. 11. Employers who have carefully orchestrated their conciliation positions will readily waive confidentiality to press their insufficient-conciliation defense. Likewise, when challenged, the EEOC has an understandable interest in proffering information to demonstrate that it has

fulfilled its statutory duty to conciliate. Lost in this back and forth is the aggrieved party's right to confidentiality, which should not be forfeited by the employer's unilateral decision to challenge the EEOC's conciliation efforts. The statute expressly requires "the written consent of the *persons concerned*" for any disclosure or use of conciliation communications in a subsequent proceeding. 42 U.S.C. § 2000e-5(b) (emphasis added). This broad language reflects an intent to ensure that charging parties retain control of their right to confidentiality.

B. Review of EEOC Conciliation Efforts Inappropriately Exposes Judges to Settlement Discussions.

An implied conciliation defense also inappropriately entangles the district court in the parties' settlement discussions, harming the charging parties.

Pre-trial conciliation negotiations are meant to remain outside of the court's review. Judges who become enmeshed in reviewing settlement negotiations are privy to confidential or privileged information about the merits of the claims, compromising their ability to remain neutral. *See, e.g.*, *EEOC v. LifeCare Mgmt. Servs., LLC*, No. 02:08-CV-1358, 2009 WL 772834, at *5 (W.D. Pa. Mar. 17, 2009) ("[T]he Court is concerned that its intimate knowledge of the details contained in the conciliation documents might reasonably result in one [of] the parties questioning the impartiality of the Court."). A judge could well

draw improper conclusions about the charging party's motivation and credibility based on the size and scope of the demand, or perceived willingness to compromise.

Moreover, if the judge routinely reviews conciliation discussions, the parties will be disinclined to candidly discuss the strengths and weaknesses of their respective positions. As one employer argued, "even under seal, these documents inappropriately disclose[ ] to the [c]ourt and its staff the confidential discussion related to resolution of this matter, which [is] information [to which] it would normally not have had access." *Id.* at *3.

Review of conciliation efforts prevents the EEOC from negotiating freely, without fear that information shared will be used against it in a subsequent proceeding. This chilling effect frustrates Title VII's goal of voluntary compliance and harms the charging parties whom the statute is intended to protect.

II. Dismissal Is Never an Appropriate Remedy for Insufficient Conciliation.

The Solicitor General has persuasively explained why allowing judicial review of conciliation is at odds with the text of Title VII. *See generally* Resp. Br. 12-19. As this Court has observed,"[i]t is not for us to rewrite [Title VII] so that it covers what we think is necessary to achieve what we think Congress really intended." *Lewis v. City of Chicago*, 560 U.S. 205, 215 (2010); *accord Univ. of Tex. Sw. Med. Ctr. v. Nassar*,

133 S. Ct. 2517, 2528-29 (2013) (refusing to read a mixed motive analysis into Title VII retaliation claims because the plain language of Title VII did not provide such an analysis). *Cf. Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 173-78 (2009) (refusing to read a mixed motive burden-shifting framework into the ADEA because it does not have the same statutory language as Title VII). Where Congress has chosen not to create a defense to Title VII, the Court should not read one into the statute.

If this Court is inclined to allow *some* limited review of conciliation efforts, dismissal should not be the remedy when those efforts fall short.[2] As the Seventh Circuit correctly concluded, dismissal on the merits "would excuse the employer's (assumed) unlawful discrimination" and "would be too final and drastic a remedy for any procedural deficiency in conciliation." *Mach Mining*, 738 F.3d at 184. Instead, if the district court determines that the employer is interested in further conciliation, the court has the option—without looking into the substance of the negotiations—to allow an additional period for settlement discussions.

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[2] Mach Mining sought complete dismissal of the EEOC's complaint below for alleged insufficient conciliation. J.A. 30.

A. Dismissal Unjustly Punishes the Victims of Discrimination.

Many victims of workplace discrimination are unable to retain private legal counsel, and instead rely on the EEOC to pursue their claims. Consequently, dismissing a lawsuit based on the pre-suit conciliation will often end the charging parties' only opportunity to vindicate their rights. This result unfairly punishes the victims of discrimination, who have little say about how the conciliation proceeds.[3] Conversely, the employer is given a free pass—it will never address the merits of the allegations or, if appropriate, change the practices at issue.

The outcome in *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657 (8th Cir. 2012), provides a particularly painful illustration. The charging parties were female truck driver trainees subjected to pervasive sexual harassment by male "lead trainers" during extended training trips in long-haul trucks. *Id.* at 665-67. One woman alleged that her trainer

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[3] The harm from dismissal is not limited to charging parties who allege discrimination under Title VII. The Americans with Disabilities Act expressly incorporates Title VII's enforcement provisions. 42 U.S.C. § 12117(a). In addition, dismissal causes even greater harm where EEOC enforcement power is exclusive and precludes any subsequent private suit by a charging party. *See* 29 U.S.C. § 626(c)(1) ("[T]he right of any person to bring [a civil] action [under the Age Discrimination in Employment Act] shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter.").

repeatedly forced her to have unwanted sex as a condition of receiving a passing grade. *Id.* at 666. "The EEOC eventually discovered that several hundred women employees claimed severe sexual harassment by CRST male trainers," including "claims of sexual propositioning, sexual assault, and rape." *Id.* at 695 (Murphy, J., dissenting). But because the district court concluded that the EEOC had not properly conducted its pre-suit investigation and conciliation, the claims of 67 women were dismissed without ever reaching the merits. *See id.* at 697 ("The dismissal of scores of women claimants with apparent trial worthy claims is affirmed by the majority even though it was CRST which ended the conciliation process and even though the EEOC made substantial efforts to investigate and conciliate prior to filing its lawsuit.").

Similarly, in *EEOC v. Bloomberg L.P.*, women who took maternity leave alleged that they were subsequently demoted, received less pay, had job functions and responsibilities taken away, and had their supervisory responsibilities reduced. 967 F. Supp. 2d 802, 806-07 (S.D.N.Y. 2013). In dismissing the claims of many of these women because of issues with the EEOC's pre-suit obligations, the district court observed that "certain claims may be meritorious but now will never see the inside of a courtroom." *Id.* at 816.

The charging parties do not just lose the ability to recover monetary damages when the EEOC's claims are dismissed. In many instances, they also

lose the potential for injunctive relief. The EEOC is more likely than plaintiffs with individual claims to pursue and fashion remedies for systemic Title VII violations. *See Gen. Tel. Co. v. EEOC*, 446 U.S. 318, 331 (1980) (recognizing the EEOC's broad power to enforce Title VII). Without these important structural remedies that are at the heart of Title VII, victims will continue to be exposed to discriminatory working conditions.

Charging parties rightfully rely on the EEOC and the statutory scheme provided by Congress to vindicate their rights. They should not have their claims defeated on purely procedural grounds resulting from a process over which they have little control.[4]

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[4] *Amici* do not intend to suggest that the EEOC has failed to properly discharge its duty to conciliate. Although Mach Mining attempts to paint the EEOC as unwilling to conciliate unless forced by the court, the data does not support this view. The EEOC initiates lawsuits in a very small percentage of cases. *See, e.g., EEOC v. Waffle House, Inc.*, 534 U.S. 279, 290 n.7 (2002). And the share of cases it has successfully conciliated has *increased* over time. *Compare* EEOC, Enforcement and Litigation Statistics, All Statutes, FY 1992-FY 1996, http://www.eeoc.gov/eeoc/statistics/enforcement/all-a.cfm (last visited Oct. 29, 2014) (from 1992 to 1996, the EEOC found reasonable cause in 9,830 cases, and successfully conciliated 2,990 of them, a rate of 30%), *with* EEOC, Enforcement and Litigation Statistics, All Statutes, FY 1997-FY 2013, http://www.eeoc.gov/eeoc/statistics/enforcement/all.cfm (last visited Oct. 29, 2014) (from 2009 to 2013, the EEOC found reasonable cause in 20,930 cases, and successfully conciliated 6,967, a rate of 33%).

B. District Courts Have the Authority to Allow Further Conciliation.

If the district court determines that the matter may be resolved through informal methods, it has ample authority to allow additional time for renewed conciliation. This outcome is consistent with the text and purpose of Title VII, and protects the rights of victims to have their claims resolved on the merits.

Courts have the authority under both Title VII and the Federal Rules of Civil Procedure to allow, or order, additional settlement discussions. Title VII provides that "the court may, in its discretion, stay further proceedings for further efforts of the Commission to obtain voluntary compliance." 42 U.S.C. § 2000e-5(f)(1). Likewise, Rule 16 of the Federal Rules of Civil Procedure gives the district court the power to order pre-trial conferences for, among other purposes, "facilitating settlement." Fed. R. Civ. P. 16(a)(5).

The district court is fully empowered to order a settlement conference or a limited stay of the litigation, and can do so without reviewing the substance of the parties' settlement negotiations. This approach furthers the goal of voluntary compliance with Title VII, while at the same time respecting the EEOC's enforcement role. Employers also get what they want: a focused opportunity to resolve the claim, which they contend they did not previously receive.[5]

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[5] Neither Mach Mining nor its *amici* address the harsh consequences of dismissal on the charging parties, nor do they

(Continued on following page)

Most importantly, avoiding outright dismissal preserves the rights of aggrieved employees to have their claims heard and resolved on the merits.

CONCLUSION

"The role of this Court is to apply the statute as it is written—even if we think some other approach might accord with good policy." *Burrage v. United States*, 134 S. Ct. 881, 892 (2014) (internal quotation marks and alteration omitted). This Court should reject Mach Mining's invitation to read into Title VII an affirmative defense that the statute does not provide.

For the foregoing reasons, *Amici Curiae* respectfully request that this Court affirm the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted on November 3, 2014,

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explain why a stay would not meet any legitimate interest in further conciliation.

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
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No. 13-1019

IN THE

Supreme Court of the United States

MACH MINING, LLC,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

BRIEF OF *AMICI CURIAE* RETAIL LITIGATION CENTER, INC., CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, AND AMERICAN TRUCKING ASSOCIATIONS, INC. IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTERESTS OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. ELIMINATING JUDICIAL REVIEW OF EEOC CONCILIATION WILL HINDER VOLUNTARY RESOLUTION OF TITLE VII DISPUTES 5

A. Experience Illustrates That the EEOC Too Often Bypasses Its Duty To Engage in Meaningful Pre-Suit Conciliation 7

B. Employers Would Have No Reason To Refuse Reasonable Conciliation Offers in Favor of Holding Out for Judicial Review 16

II. THE DECISION BELOW IS ALSO LEGALLY INDEFENSIBLE 21

A. The Seventh Circuit's Refusal To Enforce a Statutory Command Has No Legal Basis and Lacks a Limiting Principle 22

B. As Four Decades of Jurisprudence Show, Courts Have No Trouble Applying Title VII's Conciliation Requirement 25

TABLE OF CONTENTS
(continued)

Page

C. The Contemporaneous Legislative Record Refutes the Seventh Circuit's Decision.....28

CONCLUSION.....30

TABLE OF AUTHORITIES

Page(s)

CASES

Alexander v. Sandoval,
532 U.S. 275 (2001) 23

Burlington Indus., Inc. v. Ellerth,
524 U.S. 742 (1998) 5

Chandler v. Roudebush,
425 U.S. 840 (1976) 28, 29

EEOC v. Agro Distribution LLC,
555 F.3d 462 (5th Cir. 2009) 9

EEOC v. Allegheny Airlines,
436 F. Supp. 1300 (W.D. Pa. 1977) 14

EEOC v. Asplundh Tree Expert Co.,
340 F.3d 1256 (11th Cir. 2003) 5, 8, 9, 26

EEOC v. Bass Pro Outdoor World, LLC,
No. 4:11-CV-3425, 2014 U.S. Dist.
LEXIS 27019 (S.D. Tex. Mar. 4, 2014) 18

EEOC v. Bloomberg L.P.,
751 F. Supp. 2d 628 (S.D.N.Y. 2011) 18

EEOC v. Bloomberg L.P.,
967 F. Supp. 2d 802 (S.D.N.Y. 2013) 11, 12

EEOC v. Container Corp. of Am.,
352 F. Supp. 262 (M.D. Fla. 1972) 25

EEOC v. CRST Van Expedited, Inc.,
679 F.3d 657 (8th Cir. 2012) 12, 13, 26, 27

EEOC v. Dillard's, Inc.,
No. 08–CV–1780,
2011 U.S. Dist. LEXIS 76206
(S.D. Cal. July 14, 2011) 14, 15

TABLE OF AUTHORITIES
(continued)

Page(s)

EEOC v. Evans Fruit Co.,
872 F. Supp. 2d 1107
(E.D. Wash. 2012) 10, 11

EEOC v. HomeNurse, Inc.,
No. 1:13-CV-2927, 2013 U.S. Dist.
LEXIS 147686 (N.D. Ga. 2013) 9

EEOC v. Pet, Inc., Funsten Nut Div.,
612 F.2d 1001 (5th Cir. 1980) 13, 14, 25

EEOC v. Propak Logistics, Inc.,
746 F.3d 145 (4th Cir. 2014) 16

EEOC v. Ruby Tuesday, Inc.,
919 F. Supp. 2d 587 (W.D. Pa. 2013) 10

EEOC v. Sears, Roebuck & Co.,
504 F. Supp. 241 (N.D. Ill. 1980) 28

EEOC v. Sears, Roebuck & Co.,
650 F.2d 14 (2d Cir. 1981) 13, 18

EEOC v. Shell Oil Co.,
466 U.S. 54 (1984) 22, 23

EEOC v. Sherwood Med. Inust., Inc.,
452 F. Supp. 678 (M.D. Fla. 1978) 29

EEOC v. Swissport Fueling, Inc.,
916 F. Supp. 2d 1005 (D. Ariz. 2013) 11, 13

Gen. Tel. Co. of the Nw., Inc. v. EEOC,
446 U.S. 318 (1980) 26

Gonzaga Univ. v. Doe,
536 U.S. 273 (2002) 23

Hudson v. McMillian,
503 U.S. 1 (1992) 27

TABLE OF AUTHORITIES
(continued)

Page(s)

INS v. St. Cyr,
533 U.S. 289 (2001) 21

McComb v. Jacksonville Paper Co.,
336 U.S. 187 (1949) 18

Occidental Life Ins. Co. v. EEOC,
432 U.S. 355 (1977) 6, 28, 29

Pioneer Investment Servs. Co. v. Brunswick Assocs. Ltd. P'ship,
507 U.S. 380 (1993) 27

St. Paul Mercury Indem. Co. v. Red Cab Co.,
303 U.S. 283 (1938) 27

United States v. Leon,
468 U.S. 897 (1984) 27

United States v. Nixon,
418 U.S. 683 (1974) 24

Vaca v. Sipes,
386 U.S. 171 (1967) 27

Watson v. United States,
552 U.S. 74 (2007) 26

W.R. Grace & Co. v. Local Union 759,
461 U.S. 757 (1983) 5

STATUTES

5 U.S.C. § 7114(a) 27

25 U.S.C. § 2710(d) 27

28 U.S.C. § 1915(a) 27

29 U.S.C. § 158(d) 27

42 U.S.C. §12117(a) 26

TABLE OF AUTHORITIES
(continued)

Page(s)

42 U.S.C. § 1981a(b) 12

42 U.S.C. § 2000e-5(b) 17, 22

42 U.S.C. § 2000e-5(f) 19, 23, 28, 29

42 U.S.C. § 2000e-8 11

42 U.S.C. §2000e-9 11

OTHER AUTHORITIES

117 Cong. Rec. 38402 (Nov. 1, 1971) 30

117 Cong. Rec. 40290 (Nov. 10, 1971) 29

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118 Cong. Rec. 3804 (Feb. 14, 1972) 29

EEOC, Regional Attorneys' Manual, Part 3, § IV.A.2.a (Apr. 2005) 17

EEOC Strategic Enforcement Plan (Dec. 2012) 15

Scott Flaherty, *EEOC Attorney Says Presuit Attacks Excuse To Up Billables*, LAW360, Aug. 21, 2014 19

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S. Rep. No. 92-415 (1971) 29

U.S. Const. art. I, § 7 24

U.S. Const. art. I, § 8 24

U.S. Const. art. II, § 2 24

INTERESTS OF THE *AMICI CURIAE*[1]

The Retail Litigation Center, Inc. (RLC) is a public policy organization that identifies and engages in legal proceedings affecting the retail industry. The RLC's members include many of the country's largest and most innovative retailers. The member entities whose interests the RLC represents employ millions of people throughout the United States, provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues, and to highlight the potential industry-wide consequences of significant pending cases.

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

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[1] All parties have consented to the filing of this brief. As required by Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no person other than *amici*, their members, and their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

The National Federation of Independent Business (NFIB) Small Business Legal Center is a nonprofit, public-interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts. NFIB is the nation's leading small-business association; its mission is to promote and protect the right of its members to own, operate and grow their businesses. NFIB represents 350,000 businesses nationwide.

American Trucking Associations, Inc. (ATA) is the national association of the trucking industry, comprising motor carriers, state trucking associations, and national trucking conferences, and was created to promote and protect the interests of the national trucking industry. Its direct membership includes approximately 2,000 trucking companies and industry suppliers of equipment and services; and in conjunction with its affiliated organizations, ATA represents over 30,000 companies of every size, type, and class of motor carrier operation. ATA regularly represents the common interests of the trucking industry in courts throughout the nation, including before this Court.

SUMMARY OF ARGUMENT

I. The Seventh Circuit held that courts may not review the EEOC's compliance with its statutory obligation to "conciliate" prior to suing employers. In so holding, the court rested on the following policy argument: If conciliation is reviewable, employers could sandbag the negotiations and instead just "stockpile exhibits" for future litigation over the sufficiency of the EEOC's efforts, in the hopes of avoiding liability for their unlawful discrimination. That, said the court, would undermine conciliation.

On the other hand, the Court of Appeals was confident that the EEOC would have every reason to conciliate in good faith even if the EEOC's actions are not reviewable after-the-fact by any court. Based on those incorrect assumptions about the incentives of employers and the EEOC, the Seventh Circuit reached the counterintuitive conclusion that eliminating judicial review of the conciliation duty would *promote* conciliation and thereby further Congress's acknowledged intent that "voluntary compliance be the preferred means of achieving the objectives of Title VII." Pet. App. 16a (quoting *Ricci v. DeStefano*, 557 U.S. 557, 581 (2009)). Precisely the opposite is true.

Amici—as representatives of employers that face EEOC investigations and attempt to conciliate with the agency in an effort to both avoid litigation and redress any actual wrongdoing—are ideally situated to identify flaws in the Seventh Circuit's premises, both as to how the EEOC acts in the real world and as to employers' own practical incentives.

First, there are many reasons—institutional, personal, ideological, practical, strategic—why some EEOC officials, in some cases, might prefer to short-circuit or even wholly bypass conciliation in favor of bringing suit in court immediately. Four decades of enforcement history bears this out and illustrates that the EEOC too often prefers to sue first and negotiate later. There is thus good reason to conclude that, contrary to the empty assurances offered by the court below, the result of eliminating all judicial review of conciliation will be less conciliation, less voluntary resolution of disputes, and more costly and drawn-out litigation.

Second, as Congress understood, the best chance to settle a dispute is *before* litigation, because that timing allows employers to avoid the high costs of litigation and the stigma of being labeled publicly by the Commission as violators of civil rights. For that reason, also contrary to the decision below, no rational employer would invite the costs and public stigma of an EEOC lawsuit by trying to sandbag conciliation in the unlikely hope that a federal judge applying deferential review will later grant relief (which may well be only dismissal without prejudice, to allow further negotiations with the EEOC).

In short, the court below misunderstood the real incentives facing the EEOC and employers. Refusal to enforce the conciliation obligation will surely mean *less* conciliation and *more* litigation—exactly the opposite of what even the court below conceded that Congress intended.

II. Beyond its unsupportable policy rationale, the decision below is also legally indefensible, for the reasons ably articulated by Petitioner. *Amici* expand and elaborate on three of those reasons here.

First, the decision lacks any limiting principle, offering blind trust in an executive agency and relying on the faint hope of congressional oversight to cure any executive departures from its statutory obligations. Our legal system is not so sanguine. To the contrary, judicial review of executive compliance with the law is a foundational and critical component of American constitutional separation of powers.

Second, the Seventh Circuit's insistence that no judicially manageable standard is possible in this area ignores the forty-year body of jurisprudence that courts have developed to address the sufficiency

of EEOC conciliation. It also ignores the many other contexts in which courts apply similar inquiries without apparent difficulty. The inquiry into EEOC conciliation efforts may be somewhat fact-intensive, but that is no excuse for judicial abdication.

Third, the Court of Appeals' conclusion is further refuted by contemporaneous legislative materials for the 1972 amendments to Title VII. Congress *rejected* a version of the law that expressly made conciliation nonreviewable. That rejection reflected a politically necessary compromise with skeptics of the EEOC who demanded more judicial oversight. This Court should not rewrite that bargain now, yielding the EEOC the unchecked discretion Congress rejected.

In short, there is nothing unusual about judicial review of agency action; there is no reason courts cannot play their traditional role here; and such judicial review is exactly what Congress wanted.

ARGUMENT

I. ELIMINATING JUDICIAL REVIEW OF EEOC CONCILIATION WILL HINDER VOLUNTARY RESOLUTION OF TITLE VII DISPUTES.

As even the court below admitted (Pet. App. 16a), "Congress intended cooperation and conciliation to be the preferred means of enforcing Title VII." *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 770-71 (1983); *see also Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764 (1998) (acknowledging "Congress's intention to promote conciliation rather than litigation in the Title VII context" (citing *EEOC v. Shell Oil Co.*, 466 U.S. 54, 77 (1984))). Indeed, it is no overstatement to say that "[t]he duty to conciliate is at the heart of Title VII." *EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1260 (11th Cir. 2003).

By stripping federal courts of the power to oversee and enforce that conciliation obligation, the decision below strikes at the heart of Title VII. Yet, somehow, the Seventh Circuit reasoned that by eliminating all judicial review, it would *promote* conciliation. The court's conclusion is premised on its assumptions about the EEOC's and employers' motivations. The court was wrong as to both.

First, the Seventh Circuit expressed confidence that the EEOC would still engage in meaningful conciliation, even without judicial review, given its own "powerful incentives" to do so. (Pet. App. 20a-21a.) But history demonstrates that even *with* the check of judicial review, a zealous investigator—perhaps anxious to make new law, set an example, or garner a favorable headline—sometimes cuts corners from Title VII's "integrated, multistep enforcement procedure." *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 359, 368 (1977). The EEOC's incentives to do so will only intensify if this Court affirms the decision below, and removes the check of a neutral arbiter to encourage agency compliance with its statutory obligations.

Second, the Seventh Circuit worried that judicial review was encouraging employers to manipulate the conciliation process to manufacture a defense for subsequent litigation. (Pet. App. 16a-18a.) That is not only unsupported by the facts of this case or any other empirical evidence, but also implausible. Employers want to *avoid* costly, prolonged litigation and *avoid* public allegations of civil rights violations. It is fanciful to think that employers would incur with certainty the financial and reputational costs of an EEOC lawsuit and manipulate the conciliation

process, in the hopes of later convincing a judge to toss the lawsuit on procedural grounds. Moreover, the standards applied by courts to enforce the conciliation obligation are deferential to the EEOC; an employer's odds of obtaining relief through such manipulation are a long shot at best.

Affirming the decision below will therefore have a profoundly negative effect on voluntary resolution of employment disputes—harming employers *and* employees alike, and undermining congressional intent. As Congress well understood, the best time to settle disputes is *before* they reach court, *before* they attract public scrutiny, and *before* the parties become litigation adversaries. All those advantages are lost if the EEOC sues first and negotiates later. Yet that is the unfortunate but natural effect of the decision below. This Court should therefore reverse that decision.

A. Experience Illustrates That the EEOC Too Often Bypasses Its Duty To Engage in Meaningful Pre-Suit Conciliation.

The Seventh Circuit was not bothered by the prospect of eliminating judicial enforcement of the EEOC's conceded obligation to attempt conciliation before filing suit, in part because it believed that the EEOC had sufficient motivation—even absent the check of judicial review—to ensure that it would do its best to conciliate. (*See* Pet. App. 20a-21a.)

The business community is far less confident, based on many years of experience. Forty years of jurisprudence illustrates how, despite its "limits of budget and personnel" and the far-fetched prospect of congressional oversight (*see id.*), the EEOC has in many cases bypassed its statutory duty to conciliate.

This history undermines the court's counterintuitive, counter-factual assumption that eliminating review would promote conciliation, and also illustrates the wide range of EEOC conduct that the decision below insulates from review if allowed to stand. The Seventh Circuit overlooked this trail of numerous instances of the EEOC's actual failures to engage in meaningful conciliation and instead speculated about strategic behavior of employers. It is therefore worth a closer look at some illustrative cases.

Sometimes, the allure of filing a high-profile case overcomes a desire to settle privately. For example, in *Asplundh Tree*, the EEOC in a "flurry of activity" gave the employer a "grossly arbitrary" deadline of "12 business days" to consider a conciliation offer requiring "both reinstatement and front pay" as well as "nationwide notice to its employees of [the] allegations" and the duty to conduct "nationwide anti-discrimination training of all its ... employees." 340 F.3d at 1258-59. This was after a *32-month* investigation in which the employer fully cooperated, and before the agency had cited any theory of liability. *See id.* The employer's counsel attempted to contact the EEOC, but the agency "the next day" declared a failure of conciliation. *Id.* The Eleventh Circuit found that "[i]n its haste to file the instant lawsuit, with lurid, perhaps newsworthy, allegations, the EEOC failed to fulfill its statutory duty to act in good faith to achieve conciliation, effect voluntary compliance, and to reserve judicial action as a last resort." *Id.* at 1261. "The chronology of events," the court pointedly observed, "lend themselves to the interpretation that the Commission's haste may have been motivated, at least in part, by the fact that conciliation, *unlike litigation*, is not in the public

domain." *Id.* at 1261 n.3. *Cf.* EEOC Newsroom, http://www.eeoc.gov/eeoc/newsroom/index.cfm (listing EEOC press releases about litigation filings).

In other cases, particular investigators may allow their own biases to interfere with their statutory duties. For example, in *EEOC v. Agro Distribution LLC*, 555 F.3d 462 (5th Cir. 2009), "the Commission dealt in an arbitrary manner based on preconceived notions of its investigator and ignored the attempts of Agro's counsel to engage the Commission in settlement discussions." *Id.* at 468. Although the aggrieved employee "denied suffering any emotional problems from the [termination]," the EEOC made "an insupportable demand" for $120,000 in emotional-suffering damages, "as a weapon to force settlement." *Id.* at 467-68 & n.5. While the employer called the EEOC "requesting a meeting," the EEOC declared a failure of conciliation "[t]he next day." *Id.* at 467. The employer then offered to pay a smaller sum, but the EEOC failed to respond for "[n]early ten months" and then flatly rejected the offer. *Id.* In the end, *after* filing suit, the EEOC offered to settle for less than 20% of the demand in its complaint, but the employer proceeded and prevailed on the merits at summary judgment. *See id.*; *see also EEOC v. HomeNurse, Inc.*, No. 1:13-CV-2927, 2013 U.S. Dist. LEXIS 147686, at *44 (N.D. Ga. Sept. 30, 2013) ("For whatever reason, the responsible EEOC investigators and attorneys have repeatedly refused this small employer's entreaties to resolve this case quickly and in a cost-effective manner. The by-product of all of this obstinance is a small employer with a large attorney's fee bill and an unnecessary squabble in federal court.").

Internal administrative pressures may also cause EEOC investigators to neglect conciliation. In one recent case, for example, the defendant employer suggested that premature truncation of conciliation was motivated by "an administrative desire to bring this lawsuit before the expiration of the EEOC's fiscal year on September 30, 2009." *EEOC v. Ruby Tuesday, Inc.*, 919 F. Supp. 2d 587, 595 n.11 (W.D. Pa. 2013). In that case, the EEOC issued a "demand for the payment of more than $6 million dollars, coupled with nine (9) days to either say 'yes' or to make a 'best and final' response"—an approach that the court condemned as "so devoid of reasonableness" that it was "not a meaningful, good faith conciliation effort." *Id.* at 595. While the court was reluctant to endorse the employer's suggestion about the EEOC's motives, it made clear that such a purpose would be an obviously "ill-founded basis" for "obviating a direct statutory command." *Id.* at 595 n.11. *See also* Dep. Tr. at 69, *EEOC v. RPH Mgmt., Inc.*, Civ. No. 03-0502, Dkt. No. 93-6 (N.D. Ala. Nov. 23, 2005) (testimony by EEOC supervisor agreeing that he "pressure[s]" his investigators to "close the older cases prior to the end of the fiscal year"; court later dismissed suit for failure adequately to conciliate).

The EEOC sometimes is reluctant to provide the employer with the information necessary to evaluate the potential claims against it—even if such information is necessary to any reasoned decision on settlement—perhaps because the agency is expecting future litigation and does not want to give the employer any conceivable head start. Thus, for example, in *EEOC v. Evans Fruit Co.*, 872 F. Supp. 2d 1107 (E.D. Wash. 2012), the EEOC demanded $1 million for an unspecified class of female employees

who had allegedly been sexually harassed. *See id.* at 1113-14. The employer asked the EEOC for the names of the employees who had supposedly conducted the harassment, and promised to "look further into the allegations of harassment and ... provide a status report ... within two weeks." *Id.* "A mere six days later," however, the EEOC ended conciliation. *Id.* at 1114. The court faulted the EEOC for its failure "to be more forthcoming regarding the type of damages sought ..., some justification for the amount of damages sought, potential size of the class, general temporal scope of the allegations, and the potential number of individuals ... alleged to be involved in the harassment." *Id.* at 1115; *see also EEOC v. Swissport Fueling, Inc.*, 916 F. Supp. 2d 1005, 1043 (D. Ariz. 2013) (faulting EEOC for "at no point" providing employer with "basis for its calculations of back pay, compensatory damages, and punitive damages," thus leaving employer "unable to make a meaningful offer of settlement" and making EEOC's conciliation "neither bona fide nor reasonable").

Other times, the EEOC's refusal to provide such critical information might stem from a preference for using civil discovery to identify and investigate allegations of discrimination and assemble a class of claimants, even though the EEOC is able to obtain information from the employer throughout the investigatory process, *see, e.g.*, 42 U.S.C. §§ 2000e-8, 2000e-9. For example, in *EEOC v. Bloomberg L.P.*, 967 F. Supp. 2d 802 (S.D.N.Y. 2013), the EEOC found that Bloomberg had discriminated against a "class" of pregnant women and demanded $7.5 million to compensate those class members. *Id.* at 807. But the EEOC did not *identify* any of these

class members. Bloomberg requested information about these claimants (such as how many there were). *Id.* at 808. "The next day, the EEOC sent Bloomberg a letter declaring that conciliation has been unsuccessful ... " *Id.* Only after filing a federal suit and engaging in discovery did the EEOC identify the particular employees on whose behalf it sought relief. *Id.* at 813-15. By proceeding in that fashion, the EEOC created a moving target for liability, and thus denied Bloomberg "an opportunity to tailor any class-wide conciliatory efforts to the breadth of legitimate claims it might face." *Id.* at 813.[2] The court found that the EEOC had thereby "blatantly contravene[d] Title VII's emphasis on resolving disputes without resort to litigation." *Id.* at 814.

Similarly, in *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657 (8th Cir. 2012), the EEOC issued a reasonable cause determination regarding a single named employee and an unidentified "class" of other employees allegedly subjected to sexual harassment. During conciliation, the EEOC insisted that the *employer* identify the class members; it did not do any investigation of its own to determine the size of the supposed "class" or the identity of its members. *See id.* at 667-68. Only after two years of discovery in litigation did the EEOC identify the employees whom it alleged had been sexually harassed; and the "number of purported class members continuously changed throughout the discovery process." *Id.* at 676. As the district court and Eighth Circuit

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[2] The number of class members is a critical piece of information in evaluating any settlement, because damages are capped "for each complaining party." 42 U.S.C. § 1981a(b)(3).

recognized, by suing first and identifying the scope of the liability later, the EEOC unfairly deprived the employer of a "meaningful opportunity to conciliate." *Id.*; *see also Swissport Fueling*, 916 F. Supp. 2d at 1043 (noting that employer "was faced with a moving target of liability throughout the conciliation process, making it practically impossible for [employer] to accurately confront the issues before it").

Another difficulty faced by employers has been the tendency of some EEOC investigators to demand an "all-or-nothing" settlement. Thus, in *EEOC v. Sears, Roebuck & Co.*, 650 F.2d 14 (2d Cir. 1981), the EEOC brought suit alleging that the employer had engaged in race discrimination at two stores in New York. *Id.* at 16. Prior to filing the suit, however, the EEOC had offered to conciliate "only on a *nationwide* basis, rather than with respect to the two facilities that were the subject of the suit." *Id.* (emphasis added). That was inadequate, the Second Circuit held, because the "framework chosen" for conciliation "must afford a fair opportunity to discuss the practices at those installations" that are "the subject of suit." *Id.* at 19. "Sears was given no opportunity to reform its practices in Brooklyn and White Plains," which were the allegedly affected facilities, "prior to instigation of the suit." *Id.*

The EEOC's "all-or-nothing" approach was again seen in *EEOC v. Pet, Inc., Funsten Nut Division*, 612 F.2d 1001 (5th Cir. 1980) (per curiam), but in that case, the employer wanted to conciliate the claims for the alleged "class" with the exception of one particular terminated employee. *See id.* at 1002. The EEOC, however, refused to settle *any* of the claims unless that individual was granted relief. *See*

id. Thus, even though the vast majority of claims could have been voluntarily resolved, the EEOC insisted on litigating them all. "Such an all-or-nothing approach on the part of a commission, one of whose most essential functions is to attempt conciliation, will not do." *Id.*

Finally, in some cases the EEOC conciliates on claims relating to a particular *type* of discrimination or a particular *geography* or a particular *employee* but, if that fails, substantially modifies the nature of the claims before filing suit and without notice to the employer. Perhaps because the EEOC erroneously assumes that conciliation of new claims would have the same result as conciliating the old ones, it does not attempt to reopen conciliation to address the new issues. But, of course, settlement dynamics depend considerably on the suit's allegations and scope.

Thus, in *EEOC v. Allegheny Airlines*, 436 F. Supp. 1300 (W.D. Pa. 1977), the EEOC tried to conciliate a claim that the airline was discriminating against men in hiring flight attendants. *See id.* at 1305. When the parties were unable to agree on the claim of sex discrimination, the EEOC brought a suit that also asserted unrelated *race* discrimination claims that were far more inflammatory and that the employer may well have been interested in settling if given a chance, such as a claim of "excluding blacks from certain jobs because of their race." *Id.* at 1303.

Further, in *EEOC v. Dillard's, Inc.*, No. 08–CV–1780, 2011 U.S. Dist. LEXIS 76206 (S.D. Cal. July 14, 2011), the EEOC proposed to conciliate claims of two employees from a single store who were terminated for failure to provide sufficiently specific doctor notes after missing work. *See id.* at *2-5. The

EEOC proposed that the employer pay damages of $325,000 to these employees, and did not mention damages for anyone else. *Id.* at *4-5. After the employer declined the offer, the EEOC filed suit on behalf of a class of "similarly-situated individuals" and then sought *nationwide* discovery to identify the class. *See id.* at *5-6. Thus, the EEOC's "conciliation efforts focused on two individuals ... both of whom worked at the El Centro store," and gave no notice to the employer that it "potentially faced claims on behalf of a nationwide class." *Id.* at *26.

None of this is to deny that many EEOC officials genuinely prefer settlement in many cases, particularly garden-variety cases. But the above examples show that the EEOC's incentives to discuss or reach settlement can be overcome by a variety of other interests that can lead the agency to circumvent its statutory obligation to conciliate in favor of an aggressive pursuit of the EEOC's strategic agenda. *See* EEOC Strategic Enforcement Plan (Dec. 2012) ("targeted enforcement necessitates a paradigm shift to focus on specific priorities, recognizing that focused effort should have a broad and lasting impact to more effectively advance the agency's mission"). Ultimately, though, whatever the motivation, that is not the scheme that Congress designed. And if all of these incidents took place *notwithstanding* the prospect of judicial review, it is easy to see how, when the EEOC wants to litigate a case, it may allow its other interests to outweigh its interest in voluntary settlement *absent* that check.

As Judge Wilkinson recently warned, courts setting legal rules must take care not to encourage "sub-optimal agency behavior," particularly given the "danger that those inside a public bureaucracy,

armed with significant resources, authority, and discretion, may become gradually numb as to how their actions affect those outside parties they investigate or sue." *EEOC v. Propak Logistics, Inc.*, 746 F.3d 145, 156 (4th Cir. 2014) (Wilkinson, J., concurring). That warning is especially apt here, in light of Congress's intent to protect employers from the substantial burdens of EEOC litigation by allowing them the chance to voluntarily resolve Title VII complaints outside of court. Eliminating judicial review would greatly undermine that protection.

B. Employers Would Have No Reason To Refuse Reasonable Conciliation Offers in Favor of Holding Out for Judicial Review.

The second premise for the Seventh Circuit's conclusion that "review undermines conciliation" (Pet. App. 16a) was that judicial enforcement would supposedly "invit[e] employers to use the conciliation process to undermine enforcement of Title VII rather than to take the conciliation process seriously as an opportunity to resolve a dispute." (*Id.*) In that view, allowing courts to enforce the conciliation obligation "tempts employers to turn what was meant to be an informal negotiation into the subject of endless disputes" so that it can "stockpile exhibits for the coming court battle." (*Id.* at 16a-17a.) This reasoning is unsupported by both precedent and practice. It is also blind to the true incentives faced by employers when they are accused by the EEOC of violating civil rights laws.

First, the Seventh Circuit cited no decisional authority or empirical evidence that, over the forty years during which the federal courts uniformly reviewed EEOC conciliation, employers engaged in

such bad-faith tactics. Nor are *amici* aware of any judicial decisions describing such behavior. There is certainly no evidence here that Petitioner did anything but negotiate in good faith.

Second, the Seventh Circuit's ahistorical narrative presumes that employers do not seriously want to settle the claims against them. Nothing could be further from the truth. Most businesses much prefer to resolve disputes quickly, quietly, and out of the public eye. Although the Seventh Circuit speculated that employers lose nothing by turning conciliation into a litigation prelude—because "the employer remains free to settle after the EEOC files suit" (Pet. App. 18a)—that ignores the substantial benefits to employers of settling before suit is filed.

For one, most employers prefer to settle *confidentially*. 42 U.S.C. § 2000e-5(b) (conciliation must be confidential unless parties agree otherwise). A publicly filed EEOC complaint and corresponding press release and publicity can draw considerable attention from employees, investors, shareholders, and others. It harms the company's reputation, hurts morale, and may impair the employer's overall business. A principal benefit of conciliation, for employers, is that it allows them an opportunity to resolve the case *privately*, without being labeled civil rights violators by a government agency. Moreover, the Seventh Circuit's speculation ignores that, after a suit is filed, a settlement with the EEOC generally can only be obtained by agreeing to a consent decree. *See* EEOC, Regional Attorneys' Manual, Part 3, § IV.A.2.a (Apr. 2005) ("To ensure effective enforcement of Commission resolutions, the agency's practice is that settlements be in the form of a

consent decree."). Such decrees, of course, expose employers to the risk of contempt sanctions, while pre-suit settlements do not. *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949) ("The force and vitality of judicial decrees derive from more robust sanctions."). Both reasons give employers sufficient motivation to settle during conciliation rather than throw away that opportunity in the hopes of a settlement down the road after suit has been filed.

For another, the notion that an employer would reject any *reasonable* offer in the hopes of later convincing a federal judge that the offer was *unreasonable* simply ignores the deferential posture adopted by all courts with respect to conciliation. Although the Circuits have nominally articulated different standards by which to judge adequacy of conciliation efforts, most Circuits agree that the court's "role in reviewing efforts to conciliate, while not inert, is modest." *EEOC v. Bloomberg L.P.*, 751 F. Supp. 2d 628, 637 (S.D.N.Y. 2010); *see also id.* at 639 (refusing to make any "judgment about the wisdom of the parties' respective conciliation strategies"); *EEOC v. Bass Pro Outdoor World, LLC*, No. 4:11-CV-3425, 2014 U.S. Dist. LEXIS 27019, at *12, *18 (S.D. Tex. Mar. 4, 2014) (conciliation "does *not* require a minitrial" and EEOC is not governed by any "rigid rules and regulations"); *Sears*, 650 F.2d at 18 (agreeing that "Commission should be given wide latitude in shaping both the general framework of conciliation and the specific offers made"). In the vast majority of cases, the EEOC's conciliation efforts satisfy *any* Circuit's test, making it highly irrational for an employer to forfeit the opportunity to resolve a claim during the pre-suit process and instead hold out for judicial review of conciliation.

Third, if a district court does find a conciliation violation, it might (depending on the circumstances) do no more than stay proceedings to allow the parties another chance to conciliate. Indeed, Title VII expressly contemplates that courts may take such action, further belying the notion that Title VII envisioned no judicial involvement at all in the conciliation process. *See* 42 U.S.C. § 2000e-5(f)(1) ("[T]he court may, in its discretion, stay further proceedings ... for ... further efforts of the Commission to obtain voluntary compliance."). Given the district court's discretion to fashion an appropriate remedy for any violation, the Seventh Circuit's speculation that employers will assert frivolous defenses in order to later try to convince a judge to force the EEOC to resume conciliation is far-fetched. Employers want to resolve disputes quickly, not pay hefty lawyers' fees indefinitely.

Contrary to recent public speculation of a senior EEOC official, eliminating judicial review is not justified by a need to save employers from lawyers who allegedly try to "rack up billable hours" by fighting over conciliation and drawing out litigation. Scott Flaherty, *EEOC Attorney Says Presuit Attacks Excuse To Up Billables*, LAW360, Aug. 21, 2014. That paternalistic suggestion is offensive to both employers (who are more than capable of monitoring their attorneys) and lawyers (who are fiduciary-bound to act in their clients' best interests), and should not be countenanced by this Court.

Fourth, the knowledge that a conciliation record may end up before a federal judge would give any employer the added incentive to behave reasonably and make a genuine, good-faith attempt to settle. No

employer wants to get off on the wrong foot with the judge presiding over its case by asserting that the EEOC failed to conciliate when in fact the employer had rejected reasonable settlement offers. For the same reason that judicial review encourages the EEOC to act more reasonably, fairly, and openly in conducting conciliation, it encourages employers to do the same—not tempt them to do the opposite, as the court below speculated without any factual basis.

* * *

In short, if the EEOC satisfies its obligation to engage in meaningful negotiation, there is little opportunity for employers to sandbag and little incentive to waste resources. To be sure, there could be some employers who may raise frivolous objections to conciliation, just as there are some employees who raise frivolous discrimination complaints. But the former concern is no reason to eliminate judicial power to address meritorious objections, just as the latter is no reason to refuse to enforce Title VII's substantive rights. Conversely, to immunize the EEOC from judicial review would only encourage it to rush to court, refuse to share critical information, and expand its claims without notice to employers—as it has proven willing to do. The predictable result will be less conciliation and more litigation, which not only hurts employers, but also employees. In the absence of quick and effective relief as part of a negotiated settlement, employees must wait years and submit to intrusive discovery before obtaining any meaningful relief. That is the very opposite of what everyone recognizes that Congress intended.

II. THE DECISION BELOW IS ALSO LEGALLY INDEFENSIBLE.

The decision below is not just inconsistent with the policy of conciliation embodied in Title VII, but is also wrong on the law. Far from being an unusual departure from the ordinary judicial role, review of EEOC compliance with its statutory pre-suit duties is quintessentially within the judicial ken—and is exactly what Congress intended.

First, the Seventh Circuit's reasoning misstates the relevant inquiry and ultimately lacks a limiting principle. If applied to other statutory schemes, the court's broad reasoning would forbid judicial review of executive compliance with other pre-suit duties—contradicting this Court's "strong presumption in favor of judicial review of administrative action." *INS v. St. Cyr*, 533 U.S. 289, 298 (2001).

Second, the notion that there is no "meaningful standard" by which courts can judge the EEOC's compliance with the statutory obligation is a far too ready concession. Courts have been policing the agency's conciliation efforts for more than four *decades*, and a developed body of law sets forth the standards that meaningful conciliation requires. The need for multifactor, case-by-case adjudication is not a legal basis to abdicate the task of judicial review altogether—any more than in the numerous other contexts in which such adjudication is routine.

Third, the contemporaneous legislative record refutes the court's conclusion that Congress intended no judicial review of conciliation. In fact, review was part of a careful, intentional compromise to cut back on the EEOC's unchecked discretion. This Court should not rewrite that political bargain.

A. The Seventh Circuit's Refusal To Enforce a Statutory Command Has No Legal Basis and Lacks a Limiting Principle.

In refusing to enforce Title VII's requirement that the EEOC attempt conciliation before suit, the Seventh Circuit emphasized that Title VII does not expressly authorize judicial review and that this case thus presents the question whether to recognize an "implied" affirmative defense under the statute. This approach to the issue is entirely backwards. Courts are presumptively empowered to enforce the law, and to ensure that executive agencies do not exceed their boundaries. Ultimately, the reasoning adopted by the Seventh Circuit lacks a clear limiting principle and stands in substantial tension with the basic framework of the administrative state.

The court observed that Title VII "contains no express provision for an affirmative defense based on an alleged defect in the EEOC's conciliation efforts." (Pet. App. 5a-6a.) True enough: Title VII does not *specifically* direct courts to review whether the EEOC satisfied its conciliation duty, just as it does not *specifically* direct courts to review whether the EEOC received "a charge ... filed by or on behalf of a person claiming to be aggrieved," for example, or whether the EEOC "serve[d] a notice of the charge ... on such employer ... within ten days"—both of which are prerequisites to suit found in the same statutory provision. 42 U.S.C. § 2000e-5(b). However, Title VII's lack of specific direction has not stopped courts—including this Court—from ensuring EEOC compliance with those procedural requirements. *See, e.g., Shell Oil*, 466 U.S. at 67-81 (reviewing sufficiency of Commissioner's charge and notice to

employer). The reason is that Title VII, in the very same section, *does* say that federal courts "shall have jurisdiction of actions brought under this subchapter," 42 U.S.C. § 2000e-5(f)(3); and that suffices to give them the authority to adjudicate suits pursued by the EEOC—including to resolve contentions that the EEOC did not satisfy the express prerequisites to such suits.

By analogy, the Seventh Circuit drew upon the Supreme Court's jurisprudence disfavoring "implied rights of action." (Pet. App. 19a.) The crucial point, however, is that in an implied right of action case, the *plaintiff* is invoking the court's jurisdiction and seeking its intervention in a matter that would otherwise lie outside the court's power. *See, e.g.*, *Alexander v. Sandoval*, 532 U.S. 275 (2001) (plaintiff sued to enforce federal regulation against state executive agency); *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002) (plaintiff sought to sue university for damages for violating federal statute governing release of educational records). By contrast, in the Title VII context it is the *EEOC* who is suing the *employer*, 42 U.S.C. § 2000e-5(f), and the employer defendant is simply asking the court to enforce the statutory prerequisites to such an action. In other words, Title VII plainly contemplates federal suits by the EEOC to enforce the law and judicial enforcement of the statute. The only question is whether the court should enforce the *entire* statutory scheme, including those parts that require the EEOC to undertake an administrative process before bringing suit—or will enforce it only selectively. Neither this Court's implied right-of-action jurisprudence nor any other legal principle offers any support for the latter approach.

In the end, the Seventh Circuit's reasoning has no limiting principle. As Petitioner has shown, Congress often imposes statutory preconditions to suit. (Pet. Br. 19-21 (citing *Hallstron v. Tillamook Cnty.*, 493 U.S. 20, 31 (1989); *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 157-58 (2010); *Jones v. Bock*, 549 U.S. 199, 211-12 (2007); *United States v. Zucca*, 351 U.S. 91, 94 (1956); *United States v. Felt & Tarrant Mfg. Co.*, 283 U.S. 269, 272 (1931)).) In these situations, the particular statute in question does not *expressly* say that failure to comply with the precondition provides an "affirmative defense," but the courts nonetheless understand that without satisfaction of the legal prerequisite, the case cannot proceed.

The Seventh Circuit's assurance that EEOC officials are subject, in theory, to the oversight of Congress, and "are appointed by the President with the advice and consent of the Senate" (Pet. App. 20a-21a), only underscores the breadth of its position. *All* agencies are potentially subject to congressional influence, and *all* agency heads are appointed by the President or senior officers. *See* U.S. Const. art. I, §§ 7-8; art. II, § 2. Of course, that has never been viewed as a reason to free agencies from judicial review of statutory constraints. To the contrary, ensuring that executive actors comply with the law—at least where their noncompliance would impose concrete injury on third parties, as here—is the classic role of courts within our scheme of separated powers. *See United States v. Nixon*, 418 U.S. 683, 692-97, 708 (1974) (asserting judicial power to review president's assertion of executive privilege, "in light of our historic commitment to the rule of law").

B. As Four Decades of Jurisprudence Show, Courts Have No Trouble Applying Title VII's Conciliation Requirement.

Even if the courts *generally* enforce requirements applicable to the executive branch—even "pre-suit" requirements—the Seventh Circuit reasoned that courts cannot play that usual role here, due to the absence of any "meaningful standard" by which it could enforce the EEOC's obligation to attempt conciliation. (*See* Pet. App. 9a-10a.) In effect, the court ruled that because the task that Congress directed is difficult, courts are free to disregard it.

As the 40-year history of judicial review of conciliation shows, however, that concern is greatly overstated. Challenges to EEOC conciliation may be *fact-intensive*, but that hardly makes them unreviewable. And while the Seventh Circuit may prefer to avoid fact-intensive inquiries, Congress is free to impose them, and courts cannot abdicate just because they dislike the statutory regime.

Ever since the 1972 amendments were enacted, federal courts have uniformly enforced the EEOC's conciliation duty. *See EEOC v. Container Corp. of Am.*, 352 F. Supp. 262, 263-66 (M.D. Fla. 1972) (in "first" suit pursued by EEOC, holding that "to foreclose judicial inquiry into the satisfaction of the conditions [such as conciliation] would eliminate them from the Act"). A well-developed body of law has since emerged, recognizing certain basic principles by which courts can test the adequacy of the EEOC's efforts. For example: The EEOC cannot conciliate in an "all-or-nothing" fashion. *Pet*, 612 F.2d at 1002. In class action cases, where the EEOC is unconstrained by Rule 23 of the Federal Rules of

Civil Procedure, *see Gen. Tel. Co. of the Nw., Inc. v. EEOC*, 446 U.S. 318, 320 (1980), the EEOC must give the employer sufficient information about the number of affected individuals to evaluate its potential exposure. *CRST*, 679 F.3d at 678. The EEOC must provide enough time for the employer to consider its offers. *Asplundh Tree*, 340 F.3d at 1260. *See also* Pet. Br. 36-39 (setting forth principles).

Of course there are divergences among the lower courts on some questions (*see* Pet. App. 10a n.2), just as the lower courts diverge on many other issues. Because the inquiry is necessarily fact-intensive and case-specific—what is required for a "meaningful" conciliation will differ from case to case—some questions simply may not have categorical answers. (Pet. App. 10a.) But that does not make the inquiry unmanageable. Courts have been managing it for decades. And, of course, if Congress believed that judicial review of the EEOC's conciliation obligation was unmanageable, it could have eliminated that review at any time. Congress has not done so.[3]

The Seventh Circuit critiqued the "good faith" test adopted by some courts as too "difficult ... to

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[3] Indeed, that acquiescence is particularly compelling here, because Congress has amended Title VII in other ways, *see, e.g.*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1079, and has incorporated its remedial scheme (including the conciliation prerequisite) wholesale into other statutes, *see, e.g.*, 42 U.S.C. § 12117(a) (ADA). Contrary to the Seventh Circuit's implication (Pet. App. 26a n.4), this Court continues to note and take guidance from congressional acquiescence in appropriate cases. *See, e.g., Watson v. United States*, 552 U.S. 74, 82-83 (2007) (invoking "long congressional acquiescence" to judicial construction of statute).

enforce." (Pet. App. 11a (quoting *Doe v. Oberweis Dairy*, 456 F.3d 704, 711 (7th Cir. 2006)).) And, to be sure, some courts may prefer to phrase the inquiry in more objective terms (such as the requirement of a "meaningful" chance to conciliate, *CRST*, 679 F.3d at 676). But the fact is that courts apply "good faith" inquiries *all the time*. *See, e.g.*, *United States v. Leon*, 468 U.S. 897, 920 (1984) (exclusionary rule inapplicable if officer acted in "good faith"); *Pioneer Investment Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993) (creditor's "good faith" relevant to whether its late filing is "excusable" under Bankruptcy Rules); *Hudson v. McMillian*, 503 U.S. 1, 7 (1992) (excessive force inquiry turns on whether force was applied in "good-faith"); *Vaca v. Sipes*, 386 U.S. 171, 194 (1967) (union has duty to represent employees "in good faith"); *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288 (1938) (in diversity cases, sum claimed by plaintiff controls if "made in good faith"); 28 U.S.C. § 1915(a)(3) (court must certify whether *in forma pauperis* appeal is "taken in good faith").

Moreover, in many other contexts, Congress has written a good-faith *negotiation* duty into the law. *See, e.g.*, 29 U.S.C. § 158(d) (duty to negotiate with unions in good faith); 5 U.S.C. § 7114(a)(4) (same duty for federal agencies and civil-service unions); 25 U.S.C. § 2710(d)(3), (7) (requiring states to negotiate "in good faith" with Indian tribes and authorizing enforcement suits). Analyzing a negotiating party's good faith is thus hardly an unprecedented or impossible task. While some courts may prefer a more bright-line, objective test, the choice belongs to Congress. The alleged lack of a manageable standard is therefore illusory and irrelevant here.

C. The Contemporaneous Legislative Record Refutes the Seventh Circuit's Decision.

The Seventh Circuit's holding that Congress did not intend for courts to enforce the statutory duty to conciliate is also refuted by the 1972 amendments to Title VII, which first authorized the EEOC to bring enforcement actions in court after compliance with its pre-suit obligations. Specifically, early drafts of those amendments expressly specified that no judicial review of conciliation would be had—but the final, enacted amendments dropped that language, as part of a broader set of revisions that were designed to limit the EEOC's power and give federal courts greater oversight. If affirmed, the opinion below would undo that congressional choice to establish firm limits on EEOC litigation authority.

Early versions of the 1972 amendments to Title VII expressly stated that the EEOC may proceed with a lawsuit against an employer if it cannot secure "a conciliation agreement acceptable to the Commission, *which determination shall not be reviewable in any court.*" S. 2515, 92d Cong., § 4(f) (1971) (emphasis added). Skeptics of EEOC authority initially sought to amend the bill to delete that phrase, and their efforts—initially—failed. *See EEOC v. Sears, Roebuck & Co.*, 504 F. Supp. 241, 262 (N.D. Ill. 1980). But, following that skirmish, the bill *was unable to pass.* Instead, the entire bill was replaced by a substitute amendment proposed by Senator Dominick, *see Chandler v. Roudebush*, 425 U.S. 840, 855-57 (1976); *Occidental Life*, 432 U.S. at 361-66; and that version, which Congress ultimately enacted, does not include the italicized language precluding judicial review. 42 U.S.C.

§ 2000e-5(f)(1). Removing that language was a compromise measure necessary to secure the bill's passage, acceding to the views of those skeptical Senators who believed that EEOC conciliation needed "some oversight." 118 Cong. Rec. 3804 (Feb. 14, 1972); *see also EEOC v. Sherwood Med. Indus., Inc.*, 452 F Supp. 678, 683 (M.D. Fla. 1978) ("The legislative history of the 1972 amendments confirms that Congress viewed judicial relief as a recourse of last resort, sought only after a settlement has been attempted and failed.").

Indeed, the bill ultimately enacted by Congress differed dramatically from the amendments initially proposed. The initial draft would have given the EEOC the power to adjudicate complaints and issue cease-and-desist orders without going to court at all. *See Occidental Life*, 432 U.S. at 361-64. But that proposal provoked an outcry from Members of Congress who sought to guarantee employers the procedural protections and oversight of an Article III court. *See id.*; *Chandler*, 425 U.S. at 850 (describing how "grant of cease-and-desist power to the EEOC provoked strong dissenting statements"). Senator Dominick, whose substitute bill was ultimately adopted, criticized the initial bill as allowing the EEOC to act, in "Star Chamber" fashion, as "investigator, prosecutor, trial judge and judicial review board," without independent judicial checks. 117 Cong. Rec. 40290 (Nov. 10, 1971); *see also, e.g.*, S. Rep. No. 92-415 at 85 (1971) (recording views of initial Committee dissent, including Sen. Dominick, that civil rights litigation ought to be supervised by "[f]ederal court judges who, shielded from political influence by life tenure, are more likely to withstand

political pressures and render their decisions in a climate tempered by judicial reflection").

Fears of a runaway, politicized agency beyond the reach of the federal courts motivated Congress to scrap cease-and-desist authority for the EEOC and simultaneously *eliminate* the barrier to judicial review of conciliation. Rewriting that conscious congressional choice is therefore plainly improper. Put another way, a Congress worried about giving a "blank legislative check," 117 Cong. Rec. 38402 (Nov. 1, 1971) (Sen. Allen), to the "crusaders" at the EEOC, 118 Cong. Rec. 1976 (Feb. 1, 1972) (Sen. Ervin), would hardly have intended for the judicial branch to turn a blind eye when that agency ignores the statutory constraints that Congress imposed.

CONCLUSION

For the reasons stated above and by Petitioner, the decision below should be reversed.

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MACH MINING, LLC,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS.... i

TABLE OF CITED AUTHORITIES iii

STATEMENT OF INTEREST 1

SUMMARY OF THE ARGUMENT. 2

ARGUMENT. 5

I. Women in Non-Traditional Jobs Will Be Particularly Harmed by the Delays Associated with Opening Conciliation to Judicial Intervention. 5

A. Women in the Construction and Mining Industries..... 5

B. Women in Law Enforcement and Firefighting 9

C. In These Non-Traditional Fields, Justice Delayed Is Justice Denied 11

II. Judicial Second-Guessing of EEOC Confidential Conciliation Deters Claims and Stymies Systemic Reform ..... .13

Table of Contents

Page

A. Congress' Empowerment of the EEOC to Pursue Claims in Its Own Name and to Effect Systemic Reform Without Exposing Victims Is Particularly Important in Non-Traditional Fields, Where Retaliation Is Especially Dangerous and Female Workers Are Often Isolated..... ...14

B. Petitioner's Proposals Directly Subvert the EEOC's Statutorily Mandated Role in Title VII's Enforcement Scheme, Exposing Women to Retaliation and Delaying Access to Justice..... 19

III. Judicial Examination of Pre-Adjudicatory Conciliation Undermines a Crucial Stated Goal of Such Conciliation: Judicial Economy. 20

CONCLUSION 24

APPENDIX..... ....1a

TABLE OF CITED AUTHORITIES

Page

CASES

EEOC v. Mach Mining, LLC,
738 F.3d 171 (7th Cir. 2013)..... 22

EEOC v. Shell Oil Co.,
466 U.S. 54 (1984)..... 15

EEOC v. Waffle House, Inc.,
534 U.S. 279 (2002)..... 15

Gen. Tel. Co. of the Nw. v. EEOC,
446 U.S. 318 (1980).... ....14, 16

STATUTES & REGULATIONS

42 U.S.C. § 2000e-4..... 13

42 U.S.C. § 2000e-5..... ....13, 15

42 U.S.C. § 2000e-6..... 13-14

ARTICLES & BOOKS

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STATEMENT OF INTEREST

Amici Curiae are women's rights organizations and individuals* who share a longstanding commitment to workplace equality.[1] To advance that goal, *Amici* have developed expertise in Title VII and EEOC proceedings. Because of their expertise, *Amici* are uniquely equipped to inform the Court of the impact on workplace equality if Petitioner Mach Mining LLC's position prevails and employers can delay resolution of discrimination complaints by asking judges to inject themselves after the fact into Title VII's pre-litigation conciliation process and second-guess the EEOC's conduct.

Amici write to highlight the negative repercussions of Petitioner's position, specifically for women in blue-collar, non-traditional occupations.[2] Many of the female workers for whom *Amici* advocate labor in fields such as construction, mining, law enforcement, and firefighting. Women in these occupations confront some of the highest rates and most extreme examples of sexual harassment

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* Statements of interest for the organizations and a list of individual signatories may be found in Appendix A.

1. The Parties have consented to the filing of this amicus brief. Counsel for *Amici* authored this brief in its entirety. No person or entity other than *Amici*, their staff, or their counsel made a monetary contribution to the preparation or submission of this brief.

2. The Bureau of Labor Statistics defines non-traditional occupations as "those in which women comprise 25 percent or less of total employed." *Women in Nontraditional Occupations for Women in 2009*, Bureau of Labor Statistics (Apr. 2010), http://www.dol.gov/wb/factsheets/nontra2009.htm.

and other forms of gender discrimination. In *Amici*'s experience, each day of unwarranted delay in the handling of employment-discrimination claims undermines workplace safety by impeding expeditious resolution of employee complaints about discriminatory practices. Permitting after-the-fact judicial intervention into the EEOC's pre-adjudicatory conciliation process produces just such delay.

Accordingly, *Amici* submit this brief in support of Respondent EEOC's argument that permitting judicial micromanagement of the EEOC's pre-litigation conciliation efforts thwarts Title VII's overriding purpose: ending discrimination in employment. Notably, the post-hoc judicial intervention into pre-adjudicatory conciliation for which Petitioner advocates also undermines judicial economy, contravening one of the primary stated goals of mandatory pre-litigation conciliation.

SUMMARY OF THE ARGUMENT

Women in blue-collar, non-traditional jobs face employment barriers more perilous than the glass ceiling, most notably severe sexual harassment and the threat that gender discrimination will escalate into workplace violence. Non-traditional industries have both low numbers of female employees and some of the highest rates of gender discrimination. In some male-dominated occupations, women experience levels of discrimination more than three times greater than the national average. Worse still, many non-traditional jobs require collaboration among coworkers to prevent significant safety risks; in these workplaces, discrimination, harassment, and retaliation may have potentially lethal

consequences. Women working in these fields need the promise of confidentiality and systemic reform that Title VII specifically directs the EEOC to provide.

Petitioner Mach Mining proposes to interminably delay resolution of Title VII claims by subjecting the EEOC's pre-litigation conciliation efforts to after-the-fact judicial scrutiny. Fundamentally, conciliation is an informal process, designed to precede, and ideally to avoid, litigation. Permitting after-the-fact judicial intervention into this pre-adjudicatory process delays the resolution of existing cases and deters the pursuit and resolution of new claims. Such interference not only runs counter to a primary rationale behind the conciliation process, namely judicial economy, but also has particularly grim consequences for women in blue-collar, non-traditional jobs.

First, each day lost to unnecessary judicial revisiting of the pre-litigation conciliation process brings with it a heightened threat of actual harm to women who have risked their livelihoods and their lives by bringing their claims of discrimination to light. Promptly resolving the complaints of female employees in these already perilous jobs maintains workplace safety and advances equality for everyone. For women subjected to discrimination in these blue-collar, non-traditional occupations, justice delayed is justice denied.

Second, subjecting the EEOC's informal conciliation efforts to judicial intercession undercuts the agency's ability to fulfill its unique mandate within Title VII's enforcement scheme. The EEOC's role includes not only bringing lawsuits on behalf of individuals, but also litigating

charges of systemic discrimination through pattern and practice enforcement actions, as well as intervening in civil actions brought by others. By authorizing the EEOC to bring civil actions on behalf of employees, Congress offered victims of workplace discrimination both legal assistance and a degree of confidentiality. This protects employees from retaliation while they seek swift resolution of their claims. Authorizing post-hoc judicial intervention into informal, pre-adjudicatory conciliation will undermine confidentiality protections, hamstring the EEOC, and slow resolution of employment discrimination allegations. All of this will impede or ultimately stymie systemic reform in bias-infected industries.

Third, insisting on post-hoc judicial micromanagement of the pre-adjudicatory conciliation process fundamentally conflicts with the primary rationale for having such a process in the first place: promoting judicial economy by attempting to resolve cases *without judicial intervention*. Petitioner Mach Mining cannot have it both ways. If it truly believes that conciliation cannot function without judicial intervention, Petitioner should advocate replacing that pre-adjudicatory process with a court-managed effort at conciliation occurring at the outset of litigation. As it is, however, if conciliation fails, the proper role of the courts is to resolve the claims against an employer through a trial, not to stall or entirely circumvent adjudication of those claims by subjecting the pre-adjudicatory conciliation process to extended and unnecessary scrutiny.

ARGUMENT

I. Women in Non-Traditional Jobs Will Be Particularly Harmed by the Delays Associated with Opening Conciliation to Judicial Intervention.

In acutely gender-segregated occupations, low numbers of women face disproportionately high rates of discrimination; and harassment and retaliation pose tangible threats to workplace safety. These fields already involve dangerous work, which compounds the hazards attendant to gender discrimination. The harassment suffered by women in these professions includes not just frequent, inappropriate remarks based on their gender and race, but rape, assault, and death threats; women who expose themselves by reporting such misconduct face revictimization through employer retaliation. Workplace safety in dangerous industries like law enforcement and construction often depends on cooperation among workers; consequently, harassment and retaliation can take especially treacherous forms. The delay created by permitting after-the-fact judicial review of the EEOC's conciliation efforts will cause women in non-traditional jobs to suffer significant and substantial injury.

A. Women in the Construction and Mining Industries

In construction and mining, gender-based harassment intensifies already high risks of physical injury. Of the few women in these industries, the vast majority encounter at least one form of gender discrimination. Eighty-eight percent of women construction workers experience sexual harassment—more than three times the rate of the

general workforce. *See* Occupational Safety and Health Administration, *Women in the Construction Workplace: Providing Equitable Safety and Health Protection* (1999) [hereinafter OSHA Report], https://www.osha.gov/doc/accsh/haswicformal.html; Gary Langer, *One in Four U.S. Women Reports Workplace Harassment*, ABC News (Nov. 16, 2011, 12:01 AM), http://abcnews.go.com/blogs/politics/2011/11/one-in-four-u-s-women-reports-workplace-harassment/. According to OSHA, the mining industry features the highest rate of sexual harassment complaints per 100,000 employed women. OSHA Report.

Such egregious rates of harassment are unsurprising considering that most women in these industries have few or no female coworkers. Women make up just 9.1% of construction workers. *Labor Force Statistics from the Current Population Survey*, Bureau of Labor Statistics (Feb. 26, 2014) [hereinafter *Labor Force Statistics*], http://www.bls.gov/cps/cpsaat18.htm. Women in the mining industry are scarcely better represented. According to the Bureau of Labor Statistics, women comprise 13.1% of the mining workforce. *Labor Force Statistics*. Statistics also evidence the distinctly high hurdles facing women of color. For example, African American women make up 13.5% of the women in the workforce, but only 6.7% of women in construction and mining. National Women's Law Center, Women in Construction: Still Breaking Ground 2 (2014) [hereinafter Women in Construction], *available at* http://www.nwlc.org/sites/default/files/pdfs/final_nwlc_womeninconstruction_report.pdf.[3] And the harassment

3. Underrepresentation is just the first of many barriers women of color must overcome. Women of color confront more sexual harassment and earn less money than white women doing the same

goes beyond just words. One woman in a male-dominated industry, a construction worker, reported having hammers and wrenches dropped on her from the scaffolding above by her male coworkers. OSHA Report.

Beyond the sheer prevalence of harassment in such jobs, the already hazardous nature of these workplaces ratchets up the dangers harassment poses to female workers. A female miner reported that a male coworker threatened to throw her – or, as he called her, "the little bitch" – into concentrator bins, the likely result of which would have been death by suffocation or crushing. OSHA Report.

Women who do step forward to report discrimination may find themselves working in constant fear of retaliation as their cases proceed. *Amicus* Equal Rights Advocates represents a female gold miner who works in a remote geographical location. Out of the approximately 300 employees at her site, she is one of only two women who work underground. Her attempts at confronting the

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jobs (and obviously less than men, including men of color). As one study showed, "[w]omen experienced more sexual harassment than men, minorities experienced more ethnic harassment than Whites, and minority women experienced more harassment overall than majority men, minority men, and majority women." Jennifer L. Berdahl & Celia Moore, *Workplace Harassment: Double Jeopardy for Minority Women*, 91 J. of Applied Psychology 426 (2006) *available at* http://www.celiamoore.com/uploads/9/3/2/1/9321973/berdahl_moore_-_jap_-_march_2006.pdf. Census data shows that for every dollar earned by a white, non-Hispanic woman, African American women earn 82 cents and Hispanic women earn just 69 cents. *By the Numbers: A Look at the Gender Pay Gap*, American Association of University Women (Sep. 18, 2014), http://www.aauw.org/2014/09/18/gender-pay-gap/.

gender-based discrimination she faces, including the sexualized, hostile work environment in the mine, have been met with resentment and retaliation. On several occasions, men have purposefully interfered with the underground microphone system while she drills, cutting off her lifeline of communication with her coworkers and her supervisor. Concerned coworkers have advised her that if she continues to "try to change the male culture of mining" she should "watch her back" as some "not very nice" men work in the mine. She recently filed an EEOC charge alleging sex discrimination, and now fears an "accident" occurring while she works underground.

For those women in non-traditional occupations who step forward to report the gender-based harassment they face in the workplace, the specter of retaliation looms large. Women in highly-segregated industries who experience such a disproportionately hostile working environment have little incentive to risk the increased animosity and retaliation likely to await them if they go public with complaints of discrimination. The EEOC process, including conciliation, provides a measure of confidentiality to such employment-discrimination victims. *See* Part II.A. Allowing conciliation to be judicially reviewed will undermine its confidential nature, encouraging employers to use the "inadequate conciliation" defense as a wedge to obtain, and expose in public litigation, the names of all discrimination complainants and other details of the conciliation process. Indeed, Mach Mining sought exactly this information in the District Court.

B. Women in Law Enforcement and Firefighting

Women in law enforcement face similarly long odds and brutal treatment. Women "number only 11.3% of local full-time sworn officers, 12.9% of sheriffs and 16.1% of Federal officers." Diane Wetendorf, *Female Officers as Victims of Police-Perpetrated Domestic Violence* 1 (Apr. 2007) [hereinafter *Female Officers*], *available at* http://www.dwetendorf.com/Wetendorf_FemaleOfficer.pdf. In these industries too, low numbers of women face disproportionately high rates of gender-based harassment: studies show that "anywhere from 60-70% of women officers experienced sexual/gender harassment." National Center for Women & Policing, Recruiting & Retaining Women: A Self-Assessment Guide for Law Enforcement 133 (2000) [hereinafter Recruiting & Retaining Women], *available at* https://www.ncjrs.gov/pdffiles1/bja/185235.pdf.

These disturbing statistics reflect a "culture [that] does not fully welcome female officers, but requires them to assimilate into the male culture." *Female Officers* at 1. Women in law enforcement also report "being under constant surveillance and scrutiny by male officers," and having "to repeatedly prove themselves." *Id.* Male officers often view their female counterparts as inferior officers because female officers de-escalate violent situations rather than embracing violence. *Id.* at 2. At the same time, women in law enforcement are plagued by harassing comments and conduct from the men who dominate their workplaces. *Id.* Without a critical mass of women, cultural change remains unlikely; more likely, the hostile work environment experienced by female law enforcement officers will continue to deter women from integrating the profession.

Gender disparities and institutionalized hostility toward women also permeate fire departments. Mark Bendick, Jr., Denise M. Hulett, Francine Moccio, & Sheila Y. Thomas, A National Report Card on Women in Firefighting 1 (Apr. 2008) [hereinafter Women in Firefighting], *available at* http://i-women.org/wp-content/uploads/2014/07/35827WSP.pdf. Census data shows that women make up only 3.7% of firefighters. *Id.* Shockingly, more than half of the nation's fire departments have *never* employed a woman firefighter. *Id.* And, similar to women in construction and mining, 84.7% of female firefighters report experiencing gender discrimination in some form. *Id.* at 3. Female firefighters describe a grotesque gauntlet of gender-based discrimination, from harassing "pranks" such as "human feces in boots and on bathroom walls, hardcore pornography, and derogatory messages left in lockers, food contamination, shunning" to "vulgar statements, unwanted attention, and 'locker-room' pranks involving gross and juvenile sexually-related 'humor.' " *Id.* at 8.

Many more cases lurk in the shadows. Despite the high incidence of discrimination in blue-collar, non-traditional industries, women in these fields actually *complain* about workplace discrimination with startling infrequency: Studies show, for example, that only 4-6% of female law enforcement officers come forward to report harassment. Recruiting & Retaining Women at 133. Women in law enforcement who have complained of discrimination and harassment report that their departments stopped sending backup to assist them in violent situations. *Id.* at 141. Female officers who suffer such dangerous forms of retaliation often have no choice but to leave the force: Without essential backup, their lives

– already imperiled by the very nature of their work – are endangered beyond all reason. *Id.* Female firefighters who complained of discrimination and harassment reported facing comparably lethal retaliatory conduct, such as male coworkers shutting off their water supplies. Women in Firefighting at 8.

For the women in non-traditional occupations who risk their livelihoods and lives by coming forward with discrimination claims, each day of delayed relief brings a heightened risk of being thrown in a concentrator bin, losing contact during dangerous drilling operations, responding to a 911 call without backup, or attempting to fight a fire with no water. With stakes this high, there is no time to waste. But unnecessary delay is exactly what Petitioner's request for judicial intervention into pre-litigation conciliation would impose.

C. In These Non-Traditional Fields, Justice Delayed Is Justice Denied.

The stories of women in non-traditional occupations illustrate how delayed resolution of their claims harms their careers and denies them the opportunity for timely and meaningful relief. For example, *Amicus* Legal Momentum represents a New York state peace officer who began experiencing workplace discrimination in 2008, after she became pregnant. The discrimination started when the client requested a two-week leave to address temporary pregnancy-related discomfort. The employer required the client to meet with its in-house physician, who declared that upon her return to work, the client, due to her pregnancy, would be automatically ineligible to carry a firearm. The employer then transferred the

client to a much less desirable assignment, indefinitely and against her wishes. The employer refused to reconsider its decision, even after the client, upon her return from leave, presented documentation from her own physician clearing her for full duty. The client eventually filed charges with the EEOC, and, in 2011, the agency determined that the employer's policy of automatically demoting pregnant peace officers was discriminatory. Three years later, the case remains mired in conciliation. (It is notable that the case is in the Second Circuit, one of the Circuits permitting a robust failure-to-conciliate defense.) Needless to say, the sought-after accommodation will not make the client whole. The additional delay resulting from after-the-fact judicial intervention into the EEOC's pre-litigation conciliation process will only worsen this problem.

Meanwhile, the confusion caused by this conciliation quagmire prevents other women in the client's workplace from understanding and vindicating their rights. In the past 12 months, at least three coworkers have approached the client to inquire whether pregnant workers have a right to an accommodation. Judicial review of EEOC conciliation will inevitably drag out this already lengthy process. Both sides will view conciliation as the opening skirmish of a subsequent failure-to-conciliate defense by the employer. Instead of speed and informality, the parties to the "conciliation" will play it close to the vest and attempt to develop evidence on the issue of whether the EEOC adequately conciliated the employee's claims. Such a protracted conciliation process can seriously harm women by discouraging them from pursuing their rights, even when the issue at stake is as critical as an accommodation necessary to preserve a healthy pregnancy – a matter that can be of particular importance

to women in non-traditional fields due to the physical demands of their jobs.[4]

II. Judicial Second-Guessing of EEOC Confidential Conciliation Deters Claims and Stymies Systemic Reform.

Congress empowered the EEOC to identify discrimination, uproot its underlying causes, and implement systemic reform. *See* 42 U.S.C. § 2000e-5 ("The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title."). Specifically, Title VII gives the EEOC the unique ability to bring claims on behalf of employees and to pursue systemic change through pattern or practice enforcement actions.[5] *See* 42 U.S.C. § 2000e-5 (permitting the EEOC to file a civil action on behalf of a victim of discrimination); 42 U.S.C. § 2000e-4 (permitting the EEOC to intervene in a civil action); 42

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4. On the distinct risks faced by pregnant women in non-traditional occupations, *see, e.g.*, Joanna Grossman & Gillian Thomas, *Making Pregnancy Work: Overcoming the PDA's Capacity-Based Model*, 21 Yale J.L. & Feminism 15, 19-24 (2009); Deborah L. Brake & Joanna Grossman, *Unprotected Sex: The Pregnancy Discrimination Act at 35*, 68 Duke J. Gender L. & Pol'y 67 (2013).

5. *Amici* agree with Respondent EEOC that "[t]he duty to attempt conciliation does not apply in a case involving a pattern or practice of employment discrimination under 42 U.S.C. 2000e-6." Resp. Br. at 20, n. 4. To the extent that the EEOC does attempt to informally conciliate claims in situations where the statute does not so require, it should not be punished by then being subjected to post-hoc judicial scrutiny.

U.S.C. § 2000e-6 (permitting the EEOC to file pattern or practice civil actions). The EEOC's unique role in Title VII's enforcement scheme is particularly important to women working in highly segregated fields, where public exposure is especially dangerous and women often lack allies. Permitting judicial intervention into the conciliation process as Petitioner proposes will thwart the EEOC's ability to fulfill its congressional mandate, transforming it from an agent of equality into a tool of delay.

A. Congress' Empowerment of the EEOC to Pursue Claims in Its Own Name and to Effect Systemic Reform Without Exposing Victims Is Particularly Important in Non-Traditional Fields, Where Retaliation Is Especially Dangerous and Female Workers Are Often Isolated.

The unique role the EEOC plays in enforcing Title VII presents two critical benefits for women in non-traditional occupations facing gender-based discrimination. First, the agency can pursue claims under its own name, which preserves at least some confidentiality for victims of discrimination who might not otherwise be willing to come forward. Second, the EEOC can bring pattern or practice claims on behalf of entire classes, seeking systemic reform on behalf of groups of employees without named plaintiffs having to come forward as class representatives under Federal Rule of Civil Procedure 23. *See Gen. Tel. Co. of the Nw. v. EEOC*, 446 U.S. 318, 330 (1980) (Rule 23 prerequisites not applicable to EEOC actions brought in the agency's name).

In 1972 Congress amended Title VII to empower the EEOC to bring its own enforcement actions. *See* 42 U.S.C.A. § 2000e-5 (allowing the Commission to "bring a civil action against any respondent not a government agency"). When an EEOC investigation finds reasonable cause to believe that a charge of discrimination is true, it may pursue relief on behalf of the victim under the agency's own banner. With the EEOC as her ally, a victim knows that she is not fighting her employer alone. Proceeding under the banner of the EEOC minimizes a victim's exposure, and with it the burdens of conventional class litigation that might otherwise deter women in high-risk occupations from moving forward with their valid claims. "[I]ndeed, we have observed that the 1972 amendments created a system in which the EEOC was intended to bear the primary burden of litigation." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 286 (2002) (internal quotation marks omitted). Avoiding the burden of coming forward as a named plaintiff may well be the deciding factor that emboldens women in non-traditional occupations to vindicate their rights under Title VII.

Congress also authorized the EEOC to seek systemic reform. "Title VII of the Civil Rights Act of 1964, as amended, authorizes the [EEOC] 'to investigate and act on a charge' that an employer has engaged in 'a pattern or practice' of employment discrimination." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 56 (1984). Congress did so "because '[the EEOC] has access to the most current statistical computations and analyses regarding employment patterns' [and] was thought to be in the best position 'to determine where 'pattern or practice' litigation is warranted' and to pursue it." *Id.* at 69. Thus, Congress purposefully provided the EEOC with a tool to combat

structural discrimination. *See Gen. Tel. Co. of the Nw. v. EEOC*, 446 U.S. 318 (1980) (EEOC may seek classwide relief under § 706(f)(1) without being certified as the class representative under Rule 23).

Because the EEOC can protect women from the exposure typically attendant to serving as a named plaintiff in traditional class litigation, the EEOC plays a unique role in effectuating the remedial goals of Title VII. It is this unique role that is endangered by the judicial intervention into the pre-litigation conciliation process proposed by Petitioner.

Women in non-traditional industries rely especially heavily on the EEOC to eliminate discrimination. It is these women who will be most harmed by the delay associated with unnecessary judicial intervention, and by the breach of confidentiality that inevitably results when courts are invited to scrutinize every detail of the pre-litigation conciliation process.

First, in non-traditional occupations where employees depend on each other for safety, harassment and retaliation threaten not only the intended target, but also the stability and safety of the entire workplace. Allowing women to pursue claims under the aegis of the EEOC minimizes their exposure and maintains workplace stability. Similarly, the confidentiality of conciliation proceedings reduces the risk of retaliation and increases the likelihood that women will come forward. For example, when women firefighters have complained internally, they report that fire departments have ignored their complaints, or, worse still, have ostracized and retaliated against them. Women in Firefighting at 9. Accordingly, to resolve such

severe problems women "trust outside agencies, such as the EEOC, more than their own department," in large part because of the assurances that their exposure will be minimized. *Id.* at 9. Subjecting the EEOC's process to searching after-the-fact judicial review will force the women who would report such harassment back into the shadows, stymying systemic solutions.[6]

Second, the nature of non-traditional occupations and their acute gender imbalance frequently leaves female employees isolated from each other on the jobsite, while jobsites themselves are often geographically dispersed. Many non-traditional jobs fit this description. In the pin-up worlds of construction locker rooms, for example, those women who do break into the profession are often the only female employees at their jobsites. Susan Eisenberg, *Isolation of Tradeswomen Melts at Rare Conference*, Women's E-News (May 27, 2011), http://womensenews.org/story/labor/110526/isolation-tradeswomen-melts-at-rare-conference#.VEvYVvnF8WZ. Similarly, "[n]ot one paid women firefighter has ever worked in more than half of

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6. Indeed Counsel for *Amicus Curiae* in support of Petitioner, the American Insurance Association, proposes that defendants preserve evidence from EEOC conciliation for later use in concocting a "failure-to-conciliate defense." Gerald Maatman Jr. is recently quoted as saying, "There's a real premium, for attorneys representing employers and seeking to create their defenses, to be able to substantiate what was said, what was asked for and how the positions moved or didn't move during the conciliation process." Ben James, *Employers' EEOC Survival Guide: Conciliation*, Law360 (Oct. 21, 2014, 4:08 PM), http://www.law360.com/articles/575823/employers-eeoc-survival-guide-conciliation. Creating a paper trail with an eye towards revealing the details of the conciliation process in open court undercuts the informal and confidential nature of conciliation.

the nation's fire departments." Women in Firefighting 1. The atomization of women in these occupations requires a comprehensive attack on entrenched patterns and practices of discrimination, yet frustrates the ability of individual women to pursue such a strategy without the EEOC's assistance.

Worse still, the deliberate practices of employers in highly segregated industries may cause further dispersion and isolation of women. Women report a practice called "checkerboarding," whereby employers send them to a specific worksite to meet gender quotas only to fire them once they satisfy these goals. Women in Construction at 8. Women subject to checkerboarding often do not have personal knowledge of other women who experience such practices, much less of women never hired to begin with. When employers constantly shuttle their few female employees to new locations to meet quotas, these women are even less likely to have a support system on the jobsite to which they can turn when they experience gender-based discrimination. The same women are equally unlikely to take the risk of complaining about conditions on sites where they no longer work but which desperately need improvement.

In these atomized contexts, the EEOC's unique authority to bring pattern or practice claims complements the traditional class action mechanism of Rule 23 of the Federal Rules of Civil Procedure. Indeed, in the best-case scenario the pattern or practice mechanism, including robust informal conciliation, may end such systemic discrimination before traditional class action litigation can even get off the ground.

B. Petitioner's Proposals Directly Subvert the EEOC's Statutorily Mandated Role in Title VII's Enforcement Scheme, Exposing Women to Retaliation and Delaying Access to Justice.

Petitioner Mach Mining's proposals for judicial intervention into the EEOC's enforcement procedures flout Congress' carefully constructed remedial regime. The particular propositions put forward by Petitioner and its *Amici* will chill enforcement, clog courts, obstruct reform, and, ultimately, harm women.

Specifically, Mach Mining and its *Amici* propose that the EEOC be required to identify "every claim and claimant" during the conciliation process. Br. for Petitioner at 37; Br. of *Amici Curiae* Retail Litigation Center *et al.*, at 10–11. In such contexts, the threat of retaliation presents a menacing specter. Retaliation is illegal, but so are the underlying discriminatory practices that sparked the EEOC's investigation. Few victims will accept an employer's assurances that despite its prior bad acts, it intends to use the information to conciliate and not to retaliate.

Petitioner also proposes that courts should peer into the confidential discussions between women and the EEOC. According to Mach Mining, if a defendant asserts that the EEOC has failed to conciliate a claim, then a court should order the EEOC and the complainant to waive confidentiality. Pet'r's Br. at 30-31. Failure to conciliate (or even refusal to waive Title VII's confidentiality provisions), says Mach, should result in dismissal of the claim for failure of proof. *Id.* This suggestion demonstrates ignorance of the realities of gender discrimination, particularly sexual

and racial harassment claims. Court-mandated waiver of confidentiality, and the inevitable fear of public exposure of both their identities and the often sexualized nature of their allegations, will unquestionably deter women from coming forward.

Confidentiality is essential for complainants who work in unintegrated and already physically dangerous workplaces, where destabilizing retaliation risks harming more than just the intended target. The harms associated with exposing claimants far outweigh any purported benefits of judicial intervention. In reality, Mach Mining's proposed judicial entanglements will raise new barriers to ending employment discrimination. This outcome undermines the stated goal of the conciliation process: to expeditiously redress discrimination.

In essence, Petitioner's proposals would transform conciliation from an informal, swift, and efficient means of avoiding litigation into an all-consuming mini-trial, constrained by a judicially-mandated list of boxes to check before the EEOC may even knock on the courthouse door. If the EEOC must, at every stage of conciliation, protect itself from judicial second-guessing, the process will lose any semblance of informality or speed. Women will suffer, and so, too, will the courts. A judicially imposed checklist does not offer any solutions; it will make things worse.

III. Judicial Examination of Pre-Adjudicatory Conciliation Undermines a Crucial Stated Goal of Such Conciliation: Judicial Economy.

Pre-adjudication conciliation is intended to resolve disputes in a swift and cost-effective manner prior to, and

ideally without resort to, litigation. A crucial goal of such pre-adjudicatory process is judicial economy. Petitioner's proposal to permit judicial intervention into this pre-adjudicatory process, by contrast, subverts judicial economy. Mach Mining suggests that parties be required to conciliate without the aid of a court, only to have courts revisit this conciliation once litigation begins. This unnecessary detour wastes limited judicial resources and will further burden the courts. Had Congress intended for conciliation to be subject to judicial management, it could have mandated that conciliation take place as a phase of litigation rather than as a pre-adjudicatory process.

Worse yet, in the hands of the defense bar, the "failure to conciliate" affirmative defense turns upside down conciliation's original goal: a swift and cost-effective resolution that achieves justice where possible without burdening the courts. The result provides legitimate benefit to no one: courts must delve into the details of a process whose only real advantage lies in the non-involvement of the courts; the EEOC must litigate procedural issues instead of focusing on substantive systemic reform; and women in non-traditional, already high-risk fields face unnecessary and lengthy delays on the road to justice.

That this court-burdening, justice-delaying perversion of process has become an open and intentional strategy on the part of the defense bar is no secret. Defense-side "lawyers say employers would be well-served to leave the door open for a possible 'failure to conciliate' defense." Ben James, *Employers' EEOC Survival Guide: Conciliation*, Law360 (Oct. 21, 2014, 4:08 PM), http://www.law360.com/articles/575823/employers-eeoc-survival-guide-

conciliation. As one partner at a major defense-side law firm recently commented, "You don't want to be the one to say this is going nowhere if you can avoid it. You want to preserve, if you can, the argument that the agency has failed to meet its conciliation obligation in good faith." *Id.* The strategy is clear: In conciliation, employers seek to project the appearance of always being close to agreeing to resolve the claims against them, while never actually agreeing to do so, in order to create some basis for arguing that the EEOC acted in bad faith when it ultimately concludes the process and seeks justice in court. When employers embrace and string out an unproductive conciliation process in this way, it forms the first step of a litigation strategy designed to impose further delay.

The inherent inefficiency of inserting the judiciary into the pre-litigation conciliation process has thus been seized upon by those who seek the opposite of a swift and cost-effective resolution of discrimination claims. To these attorneys, the conciliation process has become nothing more than an "opportunity to seek dismissal of the lawsuit based on the failure of the EEOC's conciliation process." *Federal Courts Split on Conciliation Defense,* 37 Preventive Strategies 1 (First Quarter 2014), *available at* http://www.jacksonlewis.com/media/pnc/1/media.2611.pdf. As the Seventh Circuit noted, permitting judicial review of the conciliation process will open the door to calculated delays that will harm vulnerable employees. "Offering the implied defense invites employers to use the conciliation process to undermine enforcement of Title VII rather than to take the conciliation process seriously as an opportunity to resolve a dispute." *EEOC v. Mach Mining, LLC*, 738 F.3d 171, 178 (7th Cir. 2013).

When courts are dragged into the pre-litigation conciliation process as post-hoc micromanagers, conciliation's advantages swiftly evaporate, and what was intended to be a *pre-adjudicatory* process is transformed into a vehicle for stalling litigation, clogging the courts, impeding EEOC action, and delaying justice for the women who can least afford it. As even Petitioner's *Amicus Curiae*, the American Insurance Association, acknowledges, "Congress enacted this requirement in the interests of judicial economy, providing both the EEOC and employers with an avenue to resolve disputes confidentially, voluntarily, informally and without burdening the dockets of federal courts." Br. for Am. Ins. Ass'n. as *Amici Curiae* at 2. The post-filing adjudicative rehashing of the conciliation process proposed by Petitioner promises to turn these congressional goals on their head. Judicial intervention threatens to vitiate the stated benefits of conciliation for all involved, including an overburdened judiciary, by requiring courts to revisit pre-litigation conciliation after the fact, in all of its granular details.

CONCLUSION

For the foregoing reasons, the judgment of the Seventh Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX — DESCRIPTIONS OF SIGNATORIES

Descriptions of the *Amici Curiae*

Founded in 1974, **Equal Rights Advocates** (ERA) is a national non-profit legal organization dedicated to protecting and expanding economic and educational access and opportunities for women and girls. ERA has litigated important gender-based discrimination cases, including *Geduldig v. Aiello*, 417 U.S. 484 (1974) and *Richmond Unified School District v. Berg*, 434 U.S. 158 (1977), and has appeared as *amicus curiae* in a number of Supreme Court cases interpreting Title VII, including *Harris v. Forklift Sys.*, 510 U.S. 17 (1993) and *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986). Over the course of its forty-year history, ERA has frequently advocated on behalf of women working in male-dominated industries who have suffered egregious discrimination, harassment, and retaliation for reporting such violations. Today, ERA continues to represent women sheriffs, shipyard workers, and gold miners confronting discrimination on the job. ERA has a strong interest in ensuring that women facing discrimination in non-traditional industries have access to swift, efficient resolution of their complaints through the EEOC's pre-litigation conciliation process or the courts.

Legal Momentum (formerly the NOW Legal Defense and Education Fund) has worked to advance women's rights for more than forty years. We advocate in the courts and with federal, state, and local policymakers, as well as with unions and private business, to promote women's access to jobs by combating gender discrimination and stereotypes in employment. We have litigated

cases to secure full enforcement of laws prohibiting sex discrimination, including *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and participated as *amicus curiae* on leading cases in this area, including *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), and *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993). Legal Momentum is fully aware that discrimination against women remains pervasive, and is deeply concerned that judicial review of EEOC conciliation will hamper the ability of women to continue to challenge unlawful employment practices under Title VII without fear of delay or retaliation.

Brenda Berkman was the named plaintiff in the federal sex discrimination lawsuit that resulted in the hiring of the New York City Fire Department's first women firefighters in 1982. She rose to the rank of Captain before retiring after 25 years of proud service as a firefighter and fire officer for the City. She founded and led the FDNY's United Women Firefighters and also led the International Association for Women Firefighters for more than 10 years. She joins this brief to bring to the Court's attention the importance of suits under Title VII to women's participation and success in nontraditional fields, and the importance of not allowing overly lengthy conciliation to prevent those suits from reaching courts.

Gender Justice is a non-profit law firm based in the Midwest that eliminates gender barriers through impact litigation, policy advocacy, and education. As part of its mission, Gender Justice helps courts, employers, schools,

and the public better understand the role that cognitive bias and unconscious stereotyping plays in perpetuating discrimination, and what can be done to limit their harmful effects and ensure equality of opportunity for all. As part of its impact litigation program, Gender Justice represents individual citizens in the Midwest region and provides legal advocacy as amicus curiae in cases that have an impact in the region. Gender Justice attorneys have represented women in sex discrimination cases involving hostility toward women in blue-collar workplaces in the Midwest, such as paper mills and beet processing plants. Gender Justice has an interest in protecting and enforcing women's legal rights in the workplace, and in the proper interpretation of the Civil Rights Act of 1964 and other civil rights laws.

The **Institute for Women's Policy Research** (IWPR), founded in 1987, is an independent, non-profit research organization that conducts rigorous research and disseminates its findings to address the needs of women, promote public dialogue, and strengthen families, communities, and societies. IWPR focuses on issues of poverty and welfare, employment and earnings, work and family issues, health and safety, and women's civic and political participation. IWPR is particularly concerned with identifying the causes and consequences of the persistent gender wage gap for the welfare and economic prosperity of women and their families. Economic research suggests that non-traditional occupations for women have higher median earnings than occupations predominantly performed by women; occupational segregation accounts for a significant component of the gender wage gap.

Appendix

IWPR's research finds that women face substantial barriers when seeking to work in occupations that are non-traditional for women; these barriers include sexual harassment and discrimination in hiring, assignments and promotions.

Legal Aid Society – Employment Law Center (Legal Aid) is a public interest legal organization that advocates to improve the working lives of disadvantaged people. Since 1970, Legal Aid has represented low-wage clients in cases involving a broad range of employment-related issues, including discrimination on the basis of race, gender, age, disability, sexual orientation, gender identity, gender expression, national origin, and pregnancy. Legal Aid has appeared before this Court in discrimination cases on numerous occasions both as counsel for plaintiffs, *see, e.g.*, *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002); *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002); and *California Federal Savings & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987) (counsel for real party in interest), as well as in an *amicus curiae* capacity. *See, e.g.*, *Fisher v. U.T. Austin*, 133 S. Ct. 2411 (2013), *Wal-Mart v. Dukes*, 131 S. Ct. 2541 (2011), *U.S. v. Virginia*, 518 U.S. 515 (1996); *Harris v. Forklift Systems*, 510 U.S. 17 (1993); *International Union, UAW v. Johnson Controls*, 499 U.S. 187 (1991); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986). Legal Aid's interest in preserving the protections afforded employees by this country's antidiscrimination laws is longstanding.

Appendix

Legal Voice is a non-profit public interest organization that works to advance the legal rights of women through public impact litigation, legislation, and legal rights education. Since its founding in 1978, Legal Voice (formerly known as the Northwest Women's Law Center), has been dedicated to protecting and expanding women's rights, including the right to equality in the workplace. Toward that end, Legal Voice has advocated for legislation to advance women's workplace rights and access to equal employment opportunity. In addition, Legal Voice has participated as counsel and as amicus curiae in the Pacific Northwest and across the country in numerous cases advocating for the women's rights to equal opportunity and to work free of sex discrimination and sexual harassment in the workplace.

The **National Organization for Women (NOW) Foundation** is a 501 (c) (3) non-profit organization devoted to furthering women's rights through education and litigation. Created in 1986, NOW Foundation is affiliated with the National Organization for Women, the largest feminist activist organization in the United States, with hundreds of thousands of members and contributing supporters in hundreds of chapters in all 50 states and the District of Columbia. NOW Foundation's goals include advocating for the elimination of sex-based discrimination in employment and for the hiring and promotion of qualified women, especially in occupations that traditionally have been closed to women.

The **National Partnership for Women & Families** is a nonprofit, nonpartisan advocacy organization that uses public education and advocacy to promote fairness in the

workplace, quality health care for all, and policies that help women and men meet the dual demands of work and family. Founded in 1971 as the Women's Legal Defense Fund, the National Partnership has been instrumental in many of the major legal changes that have improved the lives of women and their families. The National Partnership has devoted significant resources to combating sex, race, and other forms of invidious discrimination and has filed numerous briefs as Amicus Curiae in the U.S. Supreme Court and in the Federal Courts of Appeals to protect constitutional and legal rights.

The **National Women's Law Center** (NWLC) is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and opportunities and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, NWLC has worked to secure equal opportunity in the workplace. This includes not only the right to a workplace that is free from all forms of discrimination and harassment, but also access to effective means of enforcing that right and remedying such conduct. NWLC has prepared or participated in several *amicus* briefs before the Supreme Court in Title VII cases, including *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006).

Susan Eisenberg is the Director of the **On Equal Terms Project** and a Resident Artist/Scholar at the Women's Studies Research Center at Brandeis University,

as well as a poet, multidisciplinary artist, policy analyst, public speaker, educator, and author of *We'll Call You If We Need You: Experiences of Women Working Construction*, a New York Times Notable Book. She entered the construction industry in 1978, becoming one of the first women in the country to achieve journey-level status as a union electrician. She is the director of the On Equal Terms Project, which uses art, witness, historic artifacts, and research to advance public conversation and action about occupational segregation in skilled trades from a grassroots perspective. She served on the Planning Team for the First National IBEW Women's Conference and on the AFL-CIO BCTD's National Team for Minority and Women Recruitment and Retention, and has addressed the International Labour Organization in Geneva, Switzerland about women in the US construction industry. The On Equal Terms Project joins this brief to call the Court's attention to the importance of government oversight in the fight against discrimination in skilled trades.

Oregon Tradeswomen, Inc., (OTI) is dedicated to promoting success for women in the trades through education, leadership and mentorship. Founded in 1989 as a small support group led by four tradeswomen (an elevator constructor, two carpenters and an operating engineer), OTI was reorganized as Oregon Tradeswomen, Inc., a 501 (c)(3) non-profit, in 1999. OTI was founded on the principles that women deserve and can attain economic self-sufficiency through pursuing careers in the building, mechanical, electrical, and utility trades while helping and encouraging the trades industry to build up

a diverse workforce. Today the organization is comprised of nearly 400 members, three programs, an annual trades career fair for women and girls, and the support of trades industry employers. OTI believes that EEOC enforcement of antidiscrimination laws is critical to the success of women in the trades.

The **Sargent Shriver National Center on Poverty Law** (Shriver Center) is a proponent of anti-poverty measures and focuses on policy and legal matters in employment, housing, health care, public benefits, criminal justice, and education. The Shriver Center's Women's Law and Policy Project concentrates on the economic security and advancement of women and girls. That is why our advocacy includes ensuring that women are able to obtain and retain employment in blue-collar, non-traditional industries such as construction, mining, law enforcement and firefighting. These industries offer a real alternative to the low wages and lack of benefits found in most other blue-collar occupations, particularly traditionally female occupations. In addition, as an organization that represents the interests of low-income people, the majority of whom are members of one or more protected class, the Shriver Center is concerned about maintaining the integrity of the EEOC process. For these reasons, the Shriver Center supports the Respondent's arguments and has a compelling interest in the outcome of this case.

The **Southwest Women's Law Center** is a non-profit policy and advocacy law center that has been focused on advancing the rights of women and girls in the workplace

for approximately 10 years. Accordingly, the Law Center is uniquely qualified to comment on, and inform the Court about, the impact of workplace equality. The Southwest Women's Law Center supports the arguments proffered by the Respondent. Permitting judicial micromanagement of the EEOC's pre-litigation conciliation efforts thwarts the remedial purpose of Title VII and undermines judicial economy. We concur with Respondent's position that litigating parties should engage in mandatory pre-adjudicatory conciliation.

The **Sugar Law Center for Economic & Social Justice** (Sugar Law) is a leading national nonprofit law center based in Detroit, Michigan in the United States of America. Sugar Law's central mission includes the promotion of economic and social rights as human rights within the legal system. Our work includes protecting the rights of all persons to work free from discrimination based on their gender. The Sugar Law Center is deeply interested in this case because its outcome will impact the right of all workers to effectively utilize EEOC procedures when they have been the victims of unlawful discrimination. The EEOC's effectiveness in cases of systemic discrimination is markedly diminished by increasingly heightened after-the-fact court review of conciliation efforts as a prerequisite to the agency's enforcement actions. Over the decades that we have served working people, we have witnessed many women systematically excluded from occupations solely based on their gender and have utilized the procedures of the EEOC to redress such unlawful discrimination. This case is critically important to preserve the agency's

effectiveness towards the shared goal of eradicating discrimination within industries traditionally closed to women. The judgment of *Amici* is based on over 15 years of experience in advocacy and representation on behalf of thousands of workers before federal and state trial and appellate courts throughout the country.

Tradeswomen, Inc. is based in Oakland, California and was founded in 1979 as a grass-roots support organization for women in blue-collar, skilled craft jobs. The organization works to recruit more women into the construction and related non-traditional trades, to promote their retention, and to develop tradeswomen's capacity for leadership and career growth. Tradeswomen, Inc. joins this brief to emphasize to the Court that judicial review of the EEOC conciliation process not only runs counter to a primary rationale behind the that process, namely judicial economy, but also has particularly grim consequences for women in blue-collar, non-traditional jobs.

Since 1964, **Wider Opportunities for Women** (WOW) has promoted women's empowerment, equity and economic security across the lifespan. Through advocacy, research, training and technical assistance WOW works to advance equal education and employment opportunities, family economic security and secure retirement. WOW has played a leadership role in defining non-traditional occupations (NTO) for women and building policy, programs and practices to advance women's opportunities in male-dominated fields. Our National Center for Women's Employment Equity has partners in 18

states, delivering direct services to prepare women for nontraditional careers funded through our Opportunities for Women in Nontraditional Employment (OWNE) Initiative. WOW provides leadership to several national coalitions, including the National Coalition on Women and Job Training, the National Task Force on Tradeswomen's Issues, the Committee on Women in the Trades of the Building and Construction Trades Department of the AFL-CIO that promote equal employment opportunity and expanded opportunities for women to enter and succeed in traditionally male-dominated occupations. WOW joins this brief to demonstrate our interest in and emphasize the importance of the EEOC's strong enforcement of Title VII to opening high-wage, high-skilled, blue-collar jobs in male-dominated fields.

The **Women's Law Project** (WLP) is a public interest legal organization dedicated to creating a more just and equitable society by advancing the rights of women through high impact litigation, public policy advocacy and community education. The Pennsylvania-based WLP has worked since its founding in 1974 to eliminate sex discrimination in our laws and institutions and to promote change in the legal system that will directly affect the status and opportunities of women. WLP assists women who have been victims of employment discrimination through its telephone counseling service and through direct legal representation. WLP has a strong interest in the proper application of civil rights laws protecting women from employment discrimination.